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No.

In the

Supreme Court of the United States

STATIA A. SKWIRA, as Administratrix of the Estate of EDWARD S. SKWIRA and STATIA A. SKWIRA, Individually; MARSHA YARROWS; EDWARD S. SKWIRA, JR.; and PHILIP E. SKWIRA,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

JOHN M. CALLAHAN
Counsel of Record for Petitioners Statia A. Skwira, et als
GROWHOSKI & CALLAHAN
60 State Street
Northampton, MA 01060
(413) 584-1500

GEORGE S. BERMAN
SUSAN S. RIEDEL
POSTERNAK, BLANKSTEIN & LUND, LLP
800 Boylston Street
Boston, MA 02199-8004
(617) 973-6100

Blanchard Press, Inc., Boston, Mass. — Law Printers (617) 426-6690

QUESTIONS PRESENTED

1. Whether a cause of action under the Federal Tort Claims Act arising out of the murder of a patient by a nurse in a Veterans Affairs Medical Center is timely presented, pursuant to 28 U.S.C. §2401(b), when submitted within two years of the date on which the claimants learn the "medical" cause of the decedent's death, as required by this Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979).

2. Whether the decision of the court of appeals misstates the appropriate discovery rule standard for accrual of a wrongful death claim under the Federal Tort Claims Act, substituting knowledge of the injury's "causal connection with the government" for knowledge of its "medical" cause, thereby creating a conflict with its own precedent as well as with other courts of appeals in analogous cases involving complex medical facts of causation in the control of the government.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, A-1) is reported at 344 F. 3d 64. The opinion of the district court (App., *infra* A-50) is reported at 204 F. Supp. 2d 216.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2003. A timely petition for rehearing en banc was denied on November 13, 2003. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

The relevant provision of the Federal Tort Claims Act, 28 U.S.C. §2401(b), provides:

"A tort claim against the United States shall be forever barred unless it is presented to the . . . . . appropriate Federal agency within two years after such claim accrues...".

STATEMENT

This case raises important, recurring questions regarding the appropriate standard of accrual, and when such accrual occurs, under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2401(b) *et seq.*, as well as the application of this Court's seminal decision on that subject in *United States v. Kubrick*, 444 U.S. 111 (1979). As such, it also involves the fundamental issue of the subject matter jurisdiction of the Federal courts under the FTCA. The

accrual provision itself, as well as the *Kubrick* rule interpreting it, has engendered substantial discussion, as well as conflict, as the district and circuit courts attempt to apply the standard to many different fact patterns. Nonetheless, the petitioners maintain that the specific "discovery rule" set forth in *Kubrick* and its progeny — from which the court of appeals departed — provides the proper criteria for resolving the accrual issue in FTCA cases premised on or functionally identical to medical malpractice, such as the instant wrongful death suit. The facts to which the proper standard should be applied are undisputed in this case. (*See* App., *infra*, at A-10).[1]

A. The Underlying Facts

Edward Skwira ("Skwira"), a decorated World War II veteran who was admitted to the VAMC for the treatment of alcoholism, died on February 18, 1996, after suffering an apparent cardiac event three days earlier. Doctors at Baystate Medical Center in Springfield, Massachusetts, where he was transferred for testing before he died, told the Skwira family (the "petitioners" herein) that he was dying of natural causes — including a heart attack and dissecting aneurysm — and that no medical or surgical intervention could save him. (App., *infra*, A-3). The fami-

[1] Indeed, the bulk of the facts which make up the record submitted to the First Circuit in this case are taken from the deposition and/or trial testimony of the two government officials, specifically Assistant U.S. Attorney William Welch ("Welch") and Trooper Kevin Murphy ("Murphy"), who conducted the criminal investigation into the murders, including that of the petitioners' decedent, which took place at the Veterans Affairs Medical Center ("VAMC") in Leeds (Northampton), Massachusetts in late 1995 and early 1996. Welch was also the chief prosecutor in the criminal trial of the individual ultimately convicted of the murders, Kristen Gilbert.

ly accepted that explanation. (C.A. App. 42-43; 301). The death certificate (which was never changed) also plausibly indicated that he had died of natural causes; specifically a dissecting aneurysm, inferior wall myocardial infarction, arrhythmia and chronic alcoholism. (*Id*; C.A. App. 115; 120). Skwira had a prior medical history which included surgery for an aortic aneurysm. (C.A. App. 151-152; 249). Thus the family, although surprised given his admission for alcohol problems, had no reason to suspect foul play. They were not privy to the internal facts or progress of the subsequent investigation, and relied on the limited information which investigators Welch and Murphy were willing or able to reveal within the confines of the criminal rules. (C.A. App. 168; 250; 261-262). The investigators admittedly developed a relationship of trust with the Skwira family, who, as Welch stated, cooperated "a hundred and ten percent" with the government. (C.A. App. 174a; 197)

In the summer of 1996, articles started to appear in local newspapers describing an inquiry into suspicious deaths at the VAMC. (App., *infra* A-3). According to Murphy, in the fall of 1996 the Skwira family had some peripheral knowledge of the criminal investigation, which he believed may have come from reading the articles that had appeared in local newspapers, but they did not have any knowledge as to whose deaths were being investigated. (C.A. 234-235).

In October 1996, Welch and Murphy sought and obtained permission from Skwira's widow, Statia, to exhume Skwira's body and perform an autopsy. As Welch testified: "I told Mrs. Skwira that we were looking at a number of deaths at the VA Medical Center, that there had been an increase in the number of deaths and there was some question as to why that increase had occurred." (C.A. App. 147-148). At that time, Welch told the family

that "it didn't necessarily mean that something wrong had occurred to Edward Skwira, that he could have died naturally, but this was just a step in the process that we need to undertake." (C.A. App. 148). The body was thereupon disinterred and autopsied, with the heart and other internal organs removed for safekeeping and further testing by the government.

The day after the autopsy, on November 8, 1996, Welch attended Skwira's reinterment and responded to Mrs. Skwira's questions about the results of the autopsy. Specifically, Welch told the family that "the death certificate as printed was incorrect", and that "he didn't die of a heart attack." However, Welch then "explained that this did not mean that he did die of unnatural causes"; and that "it was entirely possible that he could have died naturally...". (C.A. App. 151-152). Based on the information given to them on November 8, 1996, petitioners maintain they had no evidence whatsoever of the cause of Skwira's death. However, this is the date on which both the district court and the court of appeals found that their cause of action accrued under the FTCA, as discussed below.

At the time, Welch repeated his ongoing promises to keep the family informed about significant events in the investigation when he was able to do so (C.A. App. 151-152), and there is no dispute that Mrs. Skwira called Welch regularly inquiring into its status (C.A. App. 143-144; 198). Welch repeated the same essential points about the results of the autopsy (quoted above) at a meeting with the family in July 1997. (C.A. App. 139). At that meeting, Welch also told the family that the chemical ketamine had been found in Skwira's body, and asked about Skwira's medical history as part of an attempt to investigate why the ketamine was present. (C.A. App. 136; 138).

Unbeknownst to the Skwira family, the investigators suspected that the patients who had died had been poi-

soned by epinephrine, but, as of July 1997, the team still did not have meaningful toxicological evidence of epinephrine (C.A. App. 135-135a). As the district court emphasized (and the court of appeals also noted):

> "[T]he process of proving that the victims had died of epinephrine poisoning was difficult. Epinephrine occurs naturally in the body as adrenaline, and investigators found it difficult to isolate toxicological evidence that a particular patient had been killed with a lethal injection by examining tissue samples exhumed months or years after the patient's death. Moreover, the tissue examination process was unprecedented, new instrumentation was employed for the first time, and test protocols had to be written. Several doctors and scientists worked with the Government on the toxicological and pathological aspects of the investigation, which was both expensive and time consuming."

(App., *infra* A-57-58; A-5-6). The epinephrine methodologies also had to be sufficiently perfected in order to withstand *Daubert* scrutiny if used at trial. (App., *infra* A-6).

It was not until June 8, 1998, after the government's own investigation was complete, that Welch and Murphy met with the Skwira family and informed them, as the court of appeals states, "for the first time", (App., *infra* A-6) that Edward Skwira had died of epinephrine poisoning, and not natural causes; that the investigators believed they could prove that the epinephrine had been administered by Kristen Gilbert, a VAMC nurse; and that the government had sufficient evidence to present to the Grand Jury for the first degree murder of Skwira and other victims. The family was also told that legitimate administration of the ketamine had been excluded, and that its presence was further confirmation that Skwira had been poisoned while he was at the VAMC . (C.A. App. 133-135;

165). This is the date on which petitioners contend their cause of action accrued.

B. The Administrative Tort Claim and the District Court Proceedings

Petitioners filed their administrative claim form and supporting materials with the DVA on October 8, 1999, within two years of the afore-mentioned meeting with the investigators.(App., *infra* A-58). They filed this action in the district court on October 26, 2000, within six months after the date of the final denial of their claim. The complaint — brought by Statia Skwira (as administratrix of Skwira's estate and individually) and Swira's three adult children, Philip Skwira, Edward Skwira, Jr., and Marsha Yarrows — asserts claims for wrongful death and related counts. (C.A. App. 8 *et seq.*). It alleges that the U.S./VAMC, through its employees, was negligent, *inter alia*, by failing to provide adequate medical care to Skwira; allowing improper and lethal medication to be administered to Skwira; failing to properly diagnose Skwira's medical condition; failing to protect Skwira from imminent harm they knew or should have known existed; failing to properly supervise the medical personnel at the VAMC; failing to properly investigate the numerous and suspicious deaths among the patients at the VAMC when Gilbert was assigned to care for said patients; failing to monitor and control the usage of and access to the medications at the VAMC, including epinephrine; and failing to prevent Gilbert from having access to Skwira (*Id.*). The Skwiras' suit was consolidated in the district court with wrongful death actions brought under the FTCA by the families of four other patients who died, and one who was injured, while under the care of the VAMC. On December 29, 2000, the U.S. government successfully filed a motion to

stay the civil proceedings, including the subject claim, on the grounds that going forward with civil discovery would interfere with the criminal proceedings.[2]

On January 29, 2002, the U.S. filed a motion to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1), for lack of subject matter jurisdiction based on the petitioners' failure to file an administrative claim within two years of the accrual of their cause of action (C.A. App. 32). On June 11, 2002, the district court issued a decision granting the motion to dismiss the Skwiras' claim on that basis, as well as those of all but one of the plaintiff families. (App., *infra* A-50). In doing so, the court rejected the government's argument, based on this Court's decisions in *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) and *Rotella v. Wood,* 528 U.S. 549 (2000), that the Skwira family's claim accrued at the time of Skwira's death, "declin[ing] the invitation to discard the discovery rule in the wrongful death context in the absence of clearer authority." (App., *infra* A-64). As the court noted, *Kubrick* remains "good law, and discovery of injury alone is not sufficient to start the clock, at least in the medical malpractice context." (App., *infra* A-64). Moreover, the court accepted the Skwiras' assertions that "the facts of this case, charging hospital-based negligence or malfeasance, make it functionally identical to a malpractice case." (App., *infra* A-65).

Nonetheless, in applying the discovery rule to this case, the district court found that five of the six plaintiffs had failed to file their lawsuits within two years after they had both knowledge of their injuries and "sufficient indication of the injuries' cause". (*See* App., *infra*, A-65).

[2] In November 1998, Gilbert was indicted and charged with several counts of murder and assault with intent to murder. The criminal trial commenced in November 2000. In March 2001, Gilbert was convicted of first degree murder of Skwira and three other VAMC patients, second degree murder, and other lesser charges. (App., *infra* A-6). She was sentenced to life in prison without parole. (*Id.*).

The court acknowledged that "[t]he issue of precisely how much knowledge is needed to trigger accrual bedevils discovery rule analysis". (App., *infra*, A-66). However, according to the court, media reports of an investigation into cardiac-related deaths at the VAMC, beginning in the summer of 1996, triggered a duty to investigate on the part of the plaintiffs. With specific regard to the Skwiras, the district court emphasized the fact that the family had been "surprised" that Skwira died of heart complications at the VAMC, as well as on the testimony of Marsha Yarrows about her reaction to a report about the investigation. (App., *infra* A-86).

The district court held that the Skwira family's claim accrued by November 1996, when they had conversations with Welch about the results of the autopsy, even though "[a]dmittedly, plaintiffs would not have been able to prove (or possibly even learn) in 1996 that Kristen Gilbert had killed Edward specifically by injecting him with epinephrine." (App., *infra*, A-89). In concluding, the district court stated: "since the decisional law governing the discovery rule is less than crystal clear on all points, and appears to be continuing to evolve, counsel may want to consider the possibility of appeal with special care." (App., *infra*, A-93).

C. The Court of Appeals' Decision

A divided panel of the court of appeals "reluctantly" (App., *infra* A-28) affirmed the decision of the district court (with a concurrence by Chief Judge Boudin), over the strong dissent of Judge Torruella. The majority opinion (by Judge Lipez) recognized that the discovery rule set forth in *Kubrick* applies in the context of medical malpractice claims, but disagreed with the district court as well as the dissenting judge that this case is akin to medical malpractice. (App., *infra*, A-45, n. 14). Nonetheless,

the majority acknowledged that the discovery rule has been applied in wrongful death actions, as well as in situations "far beyond the medical malpractice realm", (App., *infra*, A-13), and had "no reservations" about applying it here (App., *infra* A-14-15).

The majority then analyzed *Kubrick*, stating that the decision left open the question of "what knowledge short of actual knowledge of negligence provides a sufficient factual basis to trigger accrual under a discovery rule."(App., *infra* A-16-17).[3] In fashioning an accrual rule to apply to the subject case, however, the court departed from the specific rule set forth in *Kubrick*, holding that "outside the medical malpractice context, the proper subject of knowledge for accrual purposes under the FTCA is (1) the fact of injury and (2) the injury's causal connection with the government." (App., *infra*, A-19; 21). The majority acknowledged that this rule was a revision of the district court's accrual standard, (App., *infra*, A-28), but attempted to rationalize it on the grounds that:

> "Outside the medical malpractice context... the identity of the individual(s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement. Not surprisingly, courts of appeals have been slightly more forgiving in these cases, deferring the accrual of claims until a reasonably diligent plaintiff has reason to suspect a governmental connection with the injury."

(App., *infra*, A-18).

[3] The court noted that that "question...has dogged federal courts ever since *Kubrick*", citing, *inter alia*, Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 Harv. J. on Legis. 1, 17-18 (1991), (App., *infra*, A-17), and again recognized the fact that courts of appeals have struggled to apply the *Kubrick* discovery rule outside the medical malpractice context, citing Sinclair & Szypszak at 30. (App., *infra*, A-21).

In applying its standard, the majority acknowledged that in this case, the reasonable diligence of the Skwira family "is not at issue" (App., *infra* A-23-24). Rather, the court stated that it could resolve the question of accrual on the basis of the information the family received from government officials and the local press, prior to any independent inquiry. (App., *infra*, A-24). The majority concluded, as did the district court, that the Skwiras' cause of action accrued by the day after Skwira's autopsy in November 1996, when the family learned that Skwira did not die of the causes listed on his death certificate. The majority stated that "[t]he family's subjective beliefs, described in deposition and trial testimony, reinforces the correctness of this conclusion." (App., *infra* A-24). The majority rejected the Skwiras' argument that the critical facts regarding the cause of Skwira's injury were inherently unknowable until June 1998, when they were told that Skwira had been murdered by a nurse's injection of epinephrine. According to the majority, the Skwira family reads the term "inherently unknowable" too broadly. (App., *infra* A-26).

Both the majority and the concurring opinion emphasized the "minimal" burden of filing an administrative claim, described as a "simple" "two-page form", as balanced against the interests of the government under the FTCA. (App., *infra*, A-26; 31). The concurrence described this case as "close" in that regard (App., *infra*, A-31), noting that in this case, there was no loss of evidence beneficial to the defense engendered by the delay in filing the claim. (App., *infra* A-31). As it also noted, this case was highly unusual in that the Skwira family could probably not have had definitive proof of their claim before the government completed its investigation (App., *infra* A-32). However, Judge Boudin ultimately concluded that the importance of notifying the government at the earliest opportunity outweighed other interests. (App., *infra*, A-34).

In a lengthy dissent, Judge Torruella took substantial issue with the majority opinion, stating that it "contravenes Supreme Court doctrine established in *United States v. Kubrick*, 444 U.S. 111, 118 (1979) and long-standing circuit precedent interpreting *Kubrick*." (App., *infra* A-34). In Judge Torruella's view, the majority's "causal connection" approach eliminates the long-standing *Kubrick* requirement that a claimant be aware of both the existence of his injury and the facts of causation, constituting the baseline knowledge required to trigger accrual. (App., *infra* A-34). The judge emphasized that an injury's "cause" means the immediate cause of injury from a medical point of view, and not the legal identity of the alleged tortfeasors. According to Judge Torruella, "[t]his case presents no basis for implementing a novel accrual standard" which departs from the discovery rule in *Kubrick*, as well as that "articulated by nearly every other circuit court." (App., *infra* A-35; A-37).

Moreover, Judge Torruella stated that, as established by the record, the petitioners could not possibly have discovered the medical cause of Edward Skwira's death before June 8, 1998, where the government itself was unable to discern the cause until special techniques and protocols were devised for detecting excess levels of epinephrine in the body. (App., *infra* A-34). He disagreed with the majority's assertion that this case arose "outside of the medical malpractice context", stating that: "where the facts about Skwira's injury were in the control of the government, unavailable until 1998, and impossible to obtain, the rationale for applying the discovery rule is identical to a case of pure medical malpractice." (App., *infra* A-40). The judge found no basis for implementing a new standard on the grounds that the injection with epinephrine was intentional: "This case involves a medical professional administering an excessive dose of a toxic substance to a patient undergoing treatment at a govern-

ment hospital. That the drug was administered with the intent to kill does not itself distinguish this from similar cases involving latent injury or causation, or other cases arising from a breach of the doctor-patient relationship." (App., *infra* A-39-40). He also stated: "By reducing the 'causation' requirement to mean only a 'probable connection between the injury and the defendant', the majority puts its thumb on the scale and transforms our accrual standard into one too strict for plaintiffs whose injury involves latent or complex causes. In such cases, 'considerable enquiry and investigation may be necessary before [a plaintiff] can make a responsible judgment about the actionability' of his claim." (citing *Rotella v. Wood*, 528 U.S. at 556) (App., *infra* A-42).

REASONS FOR GRANTING THE PETITION

The decision below has decided an important federal question, i.e., when a cause of action grounded on medical malpractice "accrues" under the FTCA, and its concomitant effect on federal subject matter jurisdiction, in a manner that conflicts with the seminal decision of this Court in *United States v. Kubrick*, 444 U.S. 111 (1979). *Kubrick* held that, under the discovery rule, such a cause of action accrues when the plaintiff is aware of both the injury and its "cause"; meaning, in that case, medical cause. By creating an accrual rule which is not only different from the one set forth in *Kubrick*, but more difficult for injured plaintiffs to meet, the court of appeals has set a dangerous precedent in an area of law which has spawned recurring litigation and confusion among the lower federal courts since *Kubrick*. The decision is a strong indication that it is time for this Court to revisit the *Kubrick* issue and provide additional guidance to courts grappling with the question of accrual of increasingly complex and attenuated causes of action under the

FTCA. Indeed, *Kubrick* itself was reviewed by this Court on a grant of certiorari "to resolve this important question of the administration of the statute." 444 U.S. at 116. The question is no less important twenty-five years later.

The issue is sufficiently important to merit this Court's consideration for several reasons. This case raises questions as to the appropriate standard of accrual in a death case in which the existence of a cause of action depends (much as in a medical malpractice case) upon the medical cause of death. It presents the issue of whether the fact that the act was intentional is sufficient to distinguish the time of accrual in wrongful death actions from that of garden-variety medical malpractice. The standard is particularly significant where, as here, the injury is the result of a criminal act on the part of an employee of the U.S. government, especially where the victim is a veteran to whom the U.S./DVA owes a duty to provide quality medical care and protect from harm. Finally, the case raises important policy questions regarding the proper application of the discovery rule under the FTCA where an ongoing investigation conducted by the government itself prevents plaintiffs from discovering the necessary facts to support their claim.

Moreover, the application of the discovery rule under such circumstances, where the facts of causation are in the control of the government and unavailable to the plaintiff, or involve complex factors which are "inherently unknowable" for an extended period of time, has been resolved in a manner contrary to the decision below, not only by the First Circuit itself,[4] but by other courts of appeals which have addressed the issue in analogous con-

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[4] *See, e.g., Gonzalez v. United States*, 284 F. 3d 281 (1st Cir. 2002); *Attallah v. United States*, 955 F. 2d 776 (1st Cir. 1992), *Nicolazzo v. United States*, 786 F. 2d 454 (1st Cir. 1986), discussed, *infra*, pp. 21-23.

texts. *See, e.g., Barrett v. United States*, 689 F. 2d 324 (2d Cir. 1982); *Osborn v. United States*, 918 F. 2d 724 (8th Cir. 1990); *Stoleson v. United States*, 629 F. 2d 1265 (7th Cir. 1980)(discussed, *infra*, pp. 24-25). The fact that the decision conflicts with the decisions of other circuits presenting substantially identical fact patterns warrants this Court's review.

I. The Opinion of the Court of Appeals Departs From The Accrual Standard Set Forth in *Kubrick*

A. This Case Squarely Presents The Conflict In A Context Substantially Identical To Medical Malpractice

The decision of the court of appeals, in its determination of when plaintiffs' cause of action "accrued" under the FTCA, conflicts with and misstates the rule set forth in *Kubrick*. There is no question, as the court of appeals recognized, that the well-established "discovery rule" as articulated in *Kubrick*, applies to this wrongful death case. Specifically, *Kubrick* holds that a cause of action accrues "when the plaintiff knows both the existence and the cause of his injury." *Id.* at 113 (emphasis added). Under *Kubrick*, knowledge or discovery of an injury and its cause constitutes the "factual predicate" for the claim, *id.* at 118; 121 n. 8, which this Court found occurred when the plaintiff was told by a doctor that it was "highly possible" that the hearing loss he had experienced was the result of neomycin treatment administered at a VA hospital. This was the critical causative fact that triggered the running of the statute of limitations.

Thus, "cause", as used in *Kubrick* and as applied to the present death case, refers to *medical* cause. Not only the rule, but the factual scenario of *Kubrick* makes it controlling herein, where the injury (death) was the result of the

administration of a medication or chemical substance by medical personnel, albeit intentional in this case. Accordingly, the proper inquiry is when the petitioners knew the cause of death of Edward Skwira. However, the majority of the court of appeals interprets "cause" to mean a suspicion that a government employee was responsible for the death, even though the medical cause of death (epinephrine poisoning) was unknown to and unknowable by the decedent's family at that time. Specifically, the majority bypasses the two-part standard of *Kubrick*, and substitutes a so-called "causal connection" standard, holding that "outside the medical malpractice context, the proper subject of knowledge for accrual purposes under the FTCA is (1) the fact of injury and (2) the injury's causal connection with the government." In doing so, the majority eliminates the "medical cause" prong in an inexplicable departure from *Kubrick*.

In *Kubrick*, where the administration of the medication at issue also took place in a V.A. hospital, this Court, unlike the majority opinion below, did not distinguish between cases in which a patient had a direct relationship with a doctor and those in which he or she was unaware of the doctor's employment status. As other courts of appeals have noted: "Nowhere in *Kubrick* is any reference to the legal identity of the tort-feasor". *See Gould v. U.S. Dept. of Health and Human Svcs.*, 905 F. 2d 738, 743 (4th Cir. 1990).The majority decision attempts to justify this deviation by stating (contrary to the district court as well as the dissenting opinion) that the subject case is "not 'functionally identical' to a medical malpractice case"; and that in other contexts, the courts have "deferr[ed] the accrual of claims until a reasonably diligent plaintiff has reason to suspect a governmental connection with the injury." This reasoning is faulty, improperly making the analysis dependent upon the intent with which the epinephrine was injected, when there is no basis to distinguish between

negligence and intentional conduct in applying the *Kubrick* rule. Indeed, while this case is more than sufficiently similar to a medical malpractice case to warrant application of the same discovery rule standard —given the fact that the injury arose in the context of medical treatment in a V.A. hospital[5] —whether this case sounds in medical malpractice or negligent supervision is irrelevant under the *Kubrick* analysis. As indicated above, it has elements of both, but at bottom, this is a wrongful death case in which petitioners had no conceivable knowledge of the medical cause of death for several years. There is substantial precedent, in both the First Circuit and other circuits following *Kubrick*, for applying the typical discovery rule standard in such cases.[6] The majority cites no convincing basis for applying a different rule.

In addition, while the majority contends that its replacement of the second prong of *Kubrick* with a new test is beneficial to "non-medical malpractice" claimants because it purportedly defers accrual until the governmental connection is known, in fact its application is detrimental to these petitioners because, according to the majority's result-oriented analysis, the petitioners had sufficient knowledge of a causal connection between the death and the acts or omissions of a government employee by the day after Edward Skwira's autopsy in November 1996, as opposed to June 1998 when they contend accrual occurred. Petitioners submit that it is not within the court of appeals' power to fashion a more rigorous accrual standard and apply it to deprive them of a

[5] It should be noted that the doctors, nurses and pharmacists responsible for the acts and omissions of which plaintiffs complain were medical care employees of the DVA under the applicable medical malpractice statute, 38 U.S.C. § 7316.

[6] *See, e.g., Garza v. U.S. Bureau of Prisons*, 284 F. 3d 930, 934 (8th Cir. 2002); *Diaz v. United States*, 165 F. 3d 1337, 1340 (11th Cir. 1999). *See also Heinrich v. Sweet*, 44 F. Supp. 2d 408, 415 (D. Mass. 1999).

cause of action which would not be held to have accrued at that time if the *Kubrick* rule properly were followed.[7] By holding that the claim accrued earlier under its "causal connection" rule, the majority decision directly contravenes *Kubrick*, which makes it clear that a claim cannot accrue before a plaintiff knows both the existence and cause of his injury. *Kubrick* clearly distinguished between a plaintiff's ignorance of his legal rights (which will not toll accrual) and knowledge about the predicate facts of causation (which is required to trigger accrual). Those facts are the cause "from a medical point of view", *see Gould, supra*, 905 F. 2d at 743, n. 2, a critical part of the standard that the majority misperceives.

In fact, in *Urie v. Thompson*, 337 U.S. 163 (1949), the precursor to *Kubrick*'s discovery rule, this Court held that a FELA claim brought by a railroad fireman who contracted silicosis from long-term exposure to silica dust did not accrue until the plaintiff discovered the existence, and therefore the cause, of his illness. As this Court stated in *Kubrick*: "The [*Urie*] Court was reluctant to charge *Urie* with the 'unknown and inherently unknowable' and held

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[7] Indeed, in the few cases which have stated that knowledge of the government cause of injury is required, accrual was tolled because knowledge of the wrongful conduct on the part of the government came *after* knowledge of the cause of the injury itself. *See, e.g., Diaz v. United States,* 165 F. 3d 1337 (11th Cir. 1999)("the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause")(citation omitted). *See also Garza v. United States Bureau of Prisons, supra* (suggesting standard of tolling claim until legal identity of tortfeasors as federal employees is known, in addition to, not instead of *Kubrick* rule). Here, the court of appeals' decision bars petitioners' claim because it finds that they had knowledge of the government-related cause almost a year and a half *before* they had knowledge of the actual medical cause of death, a proposition which, even if it were true, constitutes a misapplication of the *Kubrick* discovery rule.

that because of his 'blameless ignorance' of the fact of his injury, his claim did not accrue under the Federal Employers' Liability Act until his disease manifested itself." 444 U.S. 111, 121 n. 7. In *Stoleson v. United States*, 629 F. 2d 1265, 1268-1269 (7th Cir. 1980), the Seventh Circuit aptly stated: "*Urie* teaches that it is the nature of the problems faced by a plaintiff in discovering his injury and its cause, and not the occupation of the defendant, that governs the applicability of the discovery rule... Many malpractice plaintiffs face serious problems in discovering these critical facts. But as *Urie* demonstrates, the rule was not created in a medical malpractice context and is not limited to such cases." The reasoning underlying this Court's holding in *Urie*, although not followed by the court of appeals, is highly instructive in this case.

As this Court has noted more recently, "the cry for a discovery rule is loudest" in cases based on medical malpractice, because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very hard to obtain." *Rotella v. Wood*, 528 U.S. 549, 555-556 (2000), quoting *Kubrick*, 444 U.S. at 122. This is precisely such a case, and the fact that the majority decision failed to so rule, contrary to *Kubrick*'s clear holding, merits further review by this Court.

B. The Issue Presented By The Conflict Is Recurring And Important For This Court To Resolve

As indicated above, the court of appeals noted that the application of the *Kubrick* discovery rule in this and other cases presenting a variety of fact patterns has been a subject of repeated difficulty for the lower federal courts. This recognized difficulty, often, as here, reflected in holdings which conflict with the rule set forth in *Kubrick*

itself, raises important questions of construction of a major federal statute as to which only this Court can bring clarity. The determination of when a claim accrues under the FTCA is a question of federal law. *See Heinrich v. Sweet*, 44 F. Supp. 2d 408, 415 n. 8 (D. Mass. 1999). This Court may take judicial notice that at any given time, there are likely hundreds, if not thousands, of cases presenting this issue pending in the lower federal courts. Uniformity of the decisions in this area, particularly to the extent they involve medical malpractice and related claims which should be governed by the *Kubrick* rule, is extremely important for the consistent application of federal law. Moreover, since the application of the FTCA accrual rule directly implicates the subject matter jurisdiction of the federal courts, this case presents an important question warranting review by this Court. *See, e.g., Bruner v. United States*, 343 U.S. 112 (1952)(granting certiorari to resolve the conflict in decisions as to jurisdiction of the District Court under the Tucker Act).

Left standing, the court of appeals' imposition of a discovery rule standard which is harsher than that applied in *Kubrick* will have a far-reaching negative impact on those claimants who are most deserving of a precise application of the "medical cause" prong — those who *Kubrick* identifies as unable to determine that cause because the information is in the control of the defendant and very difficult to obtain. Included in this group are these and other "malpractice" plaintiffs, a large number of whose FTCA claims in fact arise out of negligent care under the auspices of the military and the DVA; i.e., veterans and their families. Requiring them to file an administrative claim before they have any basis to determine the medical cause of their injury unfairly deprives them of relief from their government, by whom they are owed a fiduciary duty. *See, e.g.,* 38 CFR §17.33 (a) (1)(governing

medical care under DVA)("Patients have a right to be treated with dignity in a humane environment that affords them...reasonable protection from harm..."); *Havrum v. United States*, 204 F. 3d 815, 817 (8th Cir. 2000)(VA hospital had duty to protect patient from injury; specifically from the nurse who presented a danger to patients by giving lethal dose of codeine). This is particularly so where the injury results from a criminal act by a government employee and requires a criminal investigation by the government. Such a scenario, by its very nature, imposes on plaintiffs a substantially higher hurdle than exists in the typical case to obtain the facts sufficient to support an administrative claim. This raises a significant issue regarding the policy implications of an accrual rule where civil plaintiffs are prevented from obtaining information until the government itself has sufficient information to indict. *See Gonzalez-Bernal v. United States*, 907 F. 2d 246, 250 (1st Cir. 1990); Fed. R. Crim. P. 6(e).

This case also raises important questions because the court of appeals' decision conflicts with existing decisions of the First Circuit on the foregoing issues, and most squarely with *Attallah v. United States*, 955 F. 2d 776 (1st Cir. 1992)(factual basis for FTCA claim inherently unknowable and did not accrue until time of indictment of U.S. customs agents for the abduction, robbery and assassination of plaintiffs' courier). Significantly, Judge Torruella, who wrote the dissenting opinion below, also wrote the opinion in *Attallah*, and his well-reasoned view that the majority decision cannot stand under that case, as well as under many other decisions applying *Kubrick* principles, merits strong consideration. In addition, the decision below directly conflicts with decisions of other circuits on the recurring issue of application of the *Kubrick* discovery rule where injured plaintiffs, even in the exercise of due diligence, could not conceivably have

discovered the medical cause of their injury within the time in which the government so contended.

II. The Decision Below Creates Both An Intra-Circuit and Inter-Circuit Conflict Regarding Application Of The *Kubrick* Discovery Rule

A. The Majority Decision Conflicts With Prior First Circuit Decisions In This Area Of Law

As the dissent noted, the majority decision conflicts with First Circuit decisions which have uniformly applied the *Kubrick* accrual standard. *See, e.g., Gonzalez v. United States*, 284 F. 3d 281 (2002)(in accordance with *Kubrick*, "a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action"). Specifically, the court in *Gonzalez* held that the plaintiff knew of the injury and its "probable" or "likely" cause when she retained her first attorney after being aware of the difficulties which occurred during labor and her baby's medical problems, and at a time where fetal heart monitoring records were available to demonstrate fetal distress which indicated the cause of the injuries. *See also Nicolazzo v. United States*, 786 F. 2d 454 (1st Cir. 1986) (citing *Kubrick* rule and holding that factual predicate for plaintiff's medical malpractice claim could not have become apparent to him before receiving a correct diagnosis of the cause of his ear problems). These cases reiterate that the date of knowledge of medical cause is the trigger for accrual.

Significantly, the decision below is also directly at odds with the First Circuit's decision in *Attallah v. United States*, 955 F. 2d 776, 780 (1st Cir. 1992), a case in which the

First Circuit applied the reasoning of *Kubrick* to determine the time of accrual of a case involving theft and murder by government officials. As the court stated in *Attallah*:

> "Under the discovery rule, the action accrues when the injured party knew or, in the exercise of reasonable diligence, should have known the factual basis for the cause of action [citing *Kubrick*]...The standard set forth by the discovery rule is an objective one. In order for the statute of limitations to be tolled pursuant to the discovery rule, the factual basis for the cause of action must have been 'inherently unknowable' at the time of the injury...[W]e find that the principles established by the discovery rule warrant a delayed accrual in this case since appellants did not know, nor in the exercise of reasonable diligence could have known of the Customs agents' criminal acts until the time of their indictment in May of 1987...
> *In light of these facts, we cannot see how appellants could have known the factual basis for their claim — the robbery and subsequent assassination of their courier by two Customs agents. The police did not have sufficient information to bring charges against the responsible Customs agents until 1987. We believe appellants could not have been more efficient."*
> (emphasis added).

The same is clearly true in this case. *See* dissenting opinion, App., *infra* A-47, n. 24. Although the majority decision engages in a semantic exercise to make *Attallah* fit its government-employee causal connection rule, App., *infra* A-23, the case is actually consistent with *Kubrick* and with the petitioners' position that they could not have known the factual basis for their claim until they learned the cause of death (and simultaneously that the government had probable cause to indict). In disregarding the reasoning and holding of *Attallah*, and creating a new

rule, the majority decision misapplies both *Kubrick* and existing circuit precedent on the critical accrual issue, a factor underscoring the need for this Court's review.

B. The Majority Decision Conflicts With Decisions From Other Circuits Applying The *Kubrick* Discovery Rule In Analogous Contexts

As stated by Judge Torruella in his dissenting opinion below, "[t]he majority's interpretation of *Kubrick* also departs from the discovery rule standard as articulated by nearly every other circuit court", citing, *inter alia*, *Massey v. United States*, 312 F. 3d 272, 276 (7th Cir. 2002); *Winter v. United States*, 244 F. 3d 1088, 1090 (9th Cir. 2001). (*See* App., *infra* A-37). These cases are cited for their adherence to the *Kubrick* rule that an FTCA claim accrues when the plaintiff knows both the existence and cause of the injury; a fundamental proposition for which numerous cases from sister circuits could be cited. This conflict presents a significant reason for this Court to revisit the application of the accrual rule set forth in *Kubrick*.

Equally, if not more important for the purposes of this petition, is the fact that in numerous cases presenting factual scenarios *similar or analogous* to this one, other circuits have applied the *Kubrick* standard to delay accrual until it can fairly be held that knowledge of the cause of the injury is obtained. These cases often involve medical treatment by government personnel, or wrongful acts by government officials which cause physical harm to individuals which is latent, unknowable or too complex for an injured plaintiff ordinarily to be expected to grasp. The facts establishing the causal link to the injury may also be in the control of the tortfeasor or otherwise not evident or discoverable. The application of this rule in

wrongful death cases in other circuits is discussed generally in *Diaz v. United States*, 165 F. 3d 1337, 1339 (11th Cir. 1999); and *Heinrich v. Sweet*, 44 F. Supp. 2d 408, 415 (D. Mass. 1999)(both deriving rationale from *Kubrick*).

Among the decisions from other circuits with which the court of appeals decision directly conflicts are: *Barrett v. United States*, 689 F. 2d 324, 329 (2d Cir. 1982) (applying *Kubrick*, critical facts concerning causation of plaintiff's father's death by being used as guinea pig in government study involving administration of mescaline derivative were not known or discoverable until Army made its disclosure of those facts in 1975; prior to that time those facts were in control of government and very difficult for estate to obtain; court noted that autopsy report led to misimpression that a heart condition was at least partly responsible for death); *Osborn v. United States*, 918 F. 2d 724, 733-734 (8th Cir. 1990)(under *Kubrick* test, plaintiff could not be charged with knowledge of cause of her daughter's injuries when the medical specialists themselves had not yet reached a conclusion; her claim accrued when a doctor told her that daughter's seizures were caused by a DPT shot administered in U.S. Air Force clinic); *Stoleson v. United States*, 629 F. 2d 1265, 1270 (7th Cir. 1980)(it was not until a doctor documented for the first time and informed plaintiff of relationship between occupational exposure to nitroglycerine and her cardiovascular problems that plaintiff's suspicion ripened into knowledge of missing critical fact of causation under *Kubrick*).

Notably, the *Stoleson* court stated that "since medical science did not then recognize the causal connection, [the plaintiff] was powerless to pursue the matter through legal channels [prior to the date that the plaintiff learned the fact of medical causation]". *Id.* Implicit in the outcome in *Kubrick*, which held that the plaintiff's claim was filed

too late under the discovery rule, was the fact that medical science recognized that the neomycin treatment the plaintiff had received was improper and had caused his injury, and thus he was no longer at the mercy of a defendant's specialized knowledge. Although the concurring opinion below noted that "[a]t least one circuit court has been willing to delay the statute while science sorted matters out", App., *infra* A-33, citing *Stoleson*, the majority failed to follow that Seventh Circuit precedent, which is directly on point in terms of the petitioners' complete inability to know the cause of the injury in this case. The court of appeals' recognition of the fact that the government, in conjunction with scientific and medical experts, was required to develop new protocols and methodologies for epinephrine testing specifically for this case, *see* App., *infra* A-6, makes clear that it should be held to constitute the type of "scientific or medical breakthough" without which a claim could not have accrued. *See Fidler v. Eastman Kodak Company*, 714 F. 2d 192, 200 (1st Cir. 1983). This squarely presents a conflict in the interpretation of §2401(b).

III. The Decision Below Is Incorrect In Its Analysis and Determination Of The Time Of Accrual

Apart from the harm to *stare decisis* inherent in the conflicts presented by the decision, the court of appeals' holding is incorrect. The court goes to great lengths to create a government causal connection rule, for reasons which make no sense under the facts of this case. In departing from the traditional discovery rule, the majority decision incorrectly states, contrary to the well-reasoned conclusions of the district court and dissenting Judge Torruella, that the subject case is not functionally

identical to medical malpractice. By applying an accrual rule which is more difficult for petitioners to meet than that usually applied in that context, the court misconstrues the law as well as the policy in this area, and reaches the wrong result as to the applicable accrual time.

Specifically, the court holds that petitioners had sufficient knowledge of a causal connection between the death and the acts or omissions of a government employee by the day after the autopsy of Edward Skwira in November 1996. However, as the dissent convincingly asserts, at that time, "[t]he only causative facts in the appellant's possession were knowledge that Skwira's death certificate was incorrect and that the hospital and its employees were the subject of an investigation...At most, the plaintiffs knew that everything they thought they knew about Skwira's death was wrong." (App., *infra* A-41). In other words, as of that date, the petitioners had been given highly equivocal information by the government investigators which expressly did not rule out death by natural causes. That cannot amount to the requisite *Kubrick* knowledge.

The majority decision bases its conclusion as to the date of accrual on newspaper articles mentioning an investigation into deaths at the VAMC, as well as on the testimony of Skwira's adult children as to their reactions to the death and to a press report. However, their testimony constitutes nothing more than hindsight, subjective impressions which do not properly form the basis for triggering the statute of limitations. The court of appeals thus overlooks its own prior statements that the discovery rule test is objective, not subjective. *See, e.g., Gonzalez, supra*, 284 F. 3d at 288. "Generalized" suspicions unsupported by medical interpretations do not establish sufficient 'awareness' to set the limitations peri-

od running when the condition involves complex medical causality." *Bath Iron Works Corp. v. U.S. Dept. of Labor*, 336 F. 3d 51, 59 (1st Cir. 2003)(citation omitted). Until the petitioners knew that Edward Skwira had been poisoned and that he did not die of natural causes, they could not know, except by pure speculation, that he suffered injury caused by a government employee — whether as a result of improper supervision or medical malpractice.

The decision below emphasizes that "definitive" knowledge or proof of the cause of the injury is not necessary to trigger the filing period. However, the petitioners never suggested that the statute be tolled until there was definitive proof; their position is that the family neither had, nor could they have had by reasonable inquiry or investigation, any evidence of the "cause of death". Had they known or been able to determine that death was caused by excess epinephrine in Edward Skwira's bloodstream, they reasonably may have surmised that an employee of the government was responsible and have had a good faith legal basis for filing an administrative claim.[8] However, as established by the record, the protocol by which the cause of death was determined did not even exist prior to the government investigation, and thus the government itself was unable to ascertain the cause until those techniques were invented and perfected. Where the cause was unknowable and undiscoverable until the government and its experts devised a new protocol (and where the need for the protocol and the conclusion derived therefrom was in the exclusive knowledge

[8] In that regard, the repeated references in the court of appeals decision to the "minimal burden" of filing an administrative claim under the FTCA are inappropriate and irrelevant to the subject inquiry — which is when the *Kubrick* test was properly met so as to trigger the two year period in which to do so. Before then, Rule 11 considerations would compel against filing a speculative and unsubstantiated claim. *See* Fed. R. Civ. P. 11(b)(3).

and control of the government), the "cause" prong of *Kubrick* cannot be held to have been satisfied.

Indeed, the majority decision fails to properly consider the policy considerations at play in this case, where the underlying cause of Skwira's death was criminal activity unknowable to the petitioners and incapable of separate investigation on their part. *See Attallah*, *supra*, 955 F. 2d at 780. The factual basis for a cause of action is inherently unknowable "if it is incapable of detection by the wronged party through the exercise of reasonable diligence." *Gonzalez*, *supra*, 284 F. 3d at 288. Such was the case here, despite petitioners' undisputed and repeated inquiries and reliance on the government authorities. *See Chamness v. United States*, 835 F. 2d 1350, 1353 (11th Cir. 1988) ("plaintiffs seeking to understand the cause of an injury may reasonably rely on advice and assurances by doctors"). The decision below incorrectly holds that petitioners were not entitled to so rely. Under *Kubrick analysis*, given the circumstances of this case, it would have been futile for petitioners to "inquir[e] among the medical and legal communities about whether [they were] wronged and should take legal action", 444 U.S. at 123, thereby militating against accrual having occurred at the time the court of appeals concludes that it did.

In fact, it would have been impossible for petitioners to have made the necessary discovery of causation following the November 1996 conversation because to do so would have been to interfere with an ongoing criminal investigation, the very reason that the government obtained a stay of the civil proceedings below. In a case such as this, in which the validity of petitioners' claim under the FTCA depends on the results of a criminal investigation and prosecution, a holding that the cause of action accrued when the petitioners learned that the government itself had sufficient information to obtain an

indictment would comport with discovery rule parameters *(see Attallah, supra)* and be consistent with the undisputed facts of this case. Indeed, if Gilbert had not been indicted, the petitioners would not have had any basis to know of the VAMC's failure to recognize that a murderer was in its midst, and therefore would have had no claim.[9]

Petitioners had no evidence or knowledge whatsoever of the critical element of the cause of death until they received the key information from the investigators on June 8, 1998 (*see* pp. 5-6, *supra*). Thus, even under the majority's characterization of the accrual standard, the result is incorrect. The "fact of injury" must mean the fact of tortious injury; and there can be no "causal connection to the government" until it is known that the injury was tortiously caused. Here, petitioners obtained knowledge of all of the critical facts constituting "cause" — both the medical cause (epinephrine poisoning), as well as its connection to the government in the form of a homicidal VAMC nurse — at the same time, during that June 8, 1998 conversation. Only at that point, and not before, did they have sufficient information to fault the government's employee in the cause of death. Petitioners respectfully submit that on this record, any federal court properly following the *Kubrick* discovery rule would so hold, as the dissenting opinion below properly concludes. *See* App., *infra* A-41-42. This Court should use its supervisory pow-

[9] This is one of the arguments made by the American Legion in an Amicus Curiae Brief in Support of Plaintiffs-Appellants filed with the court of appeals. The suggestion in the decision that this would unduly extend the discovery rule or require an exception to §2401(b) for parties awaiting the outcome of an official investigation is a misreading of their position. Petitioners were not merely sitting on their rights until that time; rather their contention is that they could not meet the "cause" prong of *Kubrick* until the government determined and informed them that Skwira had died of a lethal dose of epinephrine.

ers to correct the majority's erroneous application of the accrual standard. To let stand the decision of the court of appeals would be to improperly penalize the petitioners — who diligently attempted to learn the cause of Skwira's death, but were frustrated in their ability to do so prior to that date — and have therefore been forever barred from recovery for the tragic consequences of their loved one's murder by a government employee. This is an incorrect and unduly harsh application of the FTCA statute of limitations. As the Court stated in *Stoleson v. United States, supra*, 629 F. 2d at 1271: "She is not the kind of plaintiff nor is this the kind of case that a statute of repose like section 2401(b) or the *Kubrick* decision seek to protect against." The same is true in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN M. CALLAHAN
Counsel of Record for Petitioners
Statia A. Skwira, et als
Growhoski & Callahan
60 State Street
Northampton, MA 01060
(413) 584-1500

GEORGE A. BERMAN
SUSAN S. RIEDEL
Posternak, Blankstein & Lund LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-8004
(617) 973-6100

No. 02-1988

STATIA A. SKWIRA, as Administratrix of the Estate of Edward S. Skwira, and Individually; MARSHA YARROWS; EDWARD S. SKWIRA, JR.; PHILIP E. SKWIRA,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Michael A. Ponsor, *U.S. District Judge*]

Before

Boudin, *Chief Judge*,
Torruella and Lipez, *Circuit Judges*.

John M. Callahan, with whom *Stephen R. Kaplan*, *David C. Kuzmeski*, and *Growhoski & Callahan* were on brief, for appellants.

Richard A. Olderman, with whom *Robert D. McCallum, Jr.*, Assistant Attorney General, *Michael J. Sullivan*, United States Attorney, and *Robert S. Greenspan* were on brief, for appellee.

John Corey, Judge Advocate, *Erik Lund*, *George A. Berman*, *Susan S. Riedel*, and *Posternak, Blankstein & Lund LLP* for *amicus curiae* American Legion, in support of appellants.

September 15, 2003

LIPEZ, *Circuit Judge*. In unusual and tragic circumstances, this case requires us to apply a "discovery rule" to the issue of claim accrual under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671-2680.

I.

On February 15, 1996, Edward Skwira, a decorated World War II veteran, entered the Veterans Affairs Medical Center ("VAMC") near Northampton, Massachusetts, for the treatment of chronic alcoholism. Three days later, Skwira unexpectedly died, apparently of natural causes. Five years later, on March 14, 2001, a federal jury convicted Kristin Gilbert, a former nurse at the VAMC, of murdering Skwira and three other VAMC patients. Prosecutors claimed that Gilbert killed her victims by injecting them with lethal doses of the stimulant epinephrine to simulate a natural death. Investigators believe that Gilbert may be responsible for several other deaths at the VAMC, apart from the four for which she was convicted.

As a result of the deaths at the VAMC, Skwira's wife and children, along with the survivors of five other alleged victims of Gilbert, sued the United States under the FTCA seeking compensation for the loss of their loved ones.[1] The district court consolidated the six cases for the purposes of pretrial management,[2] and the government eventually moved to dismiss the lawsuits on statute of limitations grounds. The district court granted the motion to dismiss with respect to five of the cases, including the Skwira family's, holding that these five sets of plaintiffs had failed to file compulsory administrative claims within two years after their claims had accrued. *See* 28 U.S.C. § 2401(b). The Skwira family now appeals the dismissal of their complaint.[3] After a careful review of the record and controlling

case law, we conclude, as did the district court, that the Skwira family's claim is time-barred.

II.

In early February 1996, Skwira was admitted to an in-patient substance abuse treatment facility in Worcester, Massachusetts, for the treatment of chronic alcoholism. On February 15, he was transferred to the VAMC and placed in the hospital's Ward C, where Gilbert was working. Later that day Skwira took a drastic turn for the worse, suffering from an apparent catastrophic cardiac event. He was transferred for further tests to the Baystate Medical Center in Springfield, Massachusetts. Doctors at Baystate told the Skwira family that he was dying of natural causes — including a heart attack and dissecting aneurysm — and that no medical or surgical intervention could save him. Skwira was returned to the VAMC where he died on February 18. The immediate causes of death were listed on his death certificate as "dissecting aneurysm," "inferior wall myocardial infarction," and "arrhythmia" [sic]. No autopsy was performed.

Later that spring, the Department of Veterans Affairs Office of the Inspector General, assisted by the U.S. Attorney's Office and the Massachusetts State Police, began a criminal investigation into the unusually high number of deaths on Ward C during late 1995 through early 1996. By summer 1996, articles had started to appear in local newspapers describing an ongoing inquiry into suspicious deaths at the VAMC. In its opening sentence, one article identified "[a] federal probe into 'a higher than usual number of deaths' from cardiac arrest on one ward." The article quoted the hospital's acting director as refusing to rule out "foul play or malpractice." Another published account mentioned an investigation into the untimely death of a thirty-five-year-old patient in

Ward C. That same article indicated that a nurse was a focus of the government's probe. In early August, the U.S. Attorney's office issued a short press release confirming that, in fact, there was a grand jury investigation underway. The local press reported that the grand jury had been taking testimony for about a month, and that the investigation was "focusing on all deaths that occurred at the VAMC between fall 1995 and winter 1996."

Beginning in September or October 1996, investigators started to approach the families of individuals who had unexpectedly died in Ward C and asked permission to exhume the bodies of the deceased and to perform autopsies. Skwira's family was the first to be approached. Assistant United States Attorney William Welch and Massachusetts State Trooper Kevin Murphy met with them. "We advised them," according to Murphy, "that we were looking into deaths at the Veterans Hospital. We advised them that we had some suspicions that we would like to clear up by exhuming Edward Skwira." Welch and Murphy sought and obtained permission from Statia, Skwira's widow, to exhume Skwira's body and perform an autopsy. Welch explained that his office was "looking at a number of deaths at the VA Medical Center," and that "there had been an increase in the number of deaths and there was some question as to why that increase had occurred." Skwira's family responded that they were familiar with the press reports concerning an investigation into suspicious deaths at the VAMC, but that this was their first actual indication that Skwira's death was one that the government was investigating.

The family gave consent to exhume Skwira's body on November 7. The body was disinterred and immediately autopsied, with the heart and other internal organs removed for safekeeping and further testing. The day after the autopsy, Welch attended Skwira's reinterment with Statia and Yarrows. When Statia asked Welch about

the results of the autopsy, he informed them that "the death certificate as printed was incorrect." He told them that Skwira "didn't die of a heart attack," although he then added that this "did not mean that he did die of unnatural causes." Welch promised to keep the family informed about the progress of the investigation.

Over the next two years, the government continued its investigation and built its criminal case against Gilbert who had already been arrested in October 1996, before Skwira's autopsy, and charged with phoning bomb threats to the VAMC.[4] Statia would call Welch and other investigators regularly — approximately every four to six months — to check on the status of the investigation into Skwira's death. In response to these calls, Welch would tell her that he "couldn't really tell her other than what [he] had already told her in the past."

In July 1997 Welch scheduled a meeting with the family to inform them that the chemical ketamine had been inexplicably found in Skwira's body. Skwira's medical records contained no indication that ketamine — a powerful anaesthetic — had ever been ordered for him. Welch asked the family about any medical history not reflected in the hospital's records. He explained that further investigation was necessary to determine whether ketamine had been lawfully administered, or if it had been administered "out of error, oversight, or negligence." At this meeting, Statia brought up the November 1996 autopsy. Welch explained once again that the death certificate was not correct as stated. He again added, however, that simply because the death certificate was not correct did not mean that Skwira had died of unnatural causes. He told them that the investigation would continue.

During the months that followed, the government continued to test the heart and tissue samples removed during the autopsy. Investigators suspected that Gilbert had used epinephrine to kill her victims, but the forensic tech-

nology and protocols necessary to measure epinephrine toxicity in dated tissue samples had yet to be perfected. As the district court noted in its opinion, "[e]pinephrine occurs naturally in the body as adrenaline, and investigators found it difficult to isolate toxicological evidence that a particular patient had been killed with a lethal injection by examining tissue samples exhumed months or years after the patient's death." *Cutting*, 204 F. Supp. 2d at 220. Hence the government was obliged to invest significant resources to develop adequate epinephrine testing protocols and research methodologies which, if used at trial, would ultimately have to withstand *Daubert* scrutiny. [5]

The government's investment was eventually fruitful. On June 8, 1998, Welch and Murphy met with the family and informed them for the first time that Skwira had not died of natural causes. Toxicological tests had conclusively determined that Skwira had died of epinephrine poisoning. Welch and Murphy also expressed their belief that Gilbert had murdered Skwira, and they indicated that they would present evidence of Skwira's murder to a grand jury in seeking an indictment for first degree murder. Finally, Welch told the Skwira family that investigators had excluded the possibility of a legitimate administration of ketamine and that the drug's presence was further confirmation that Skwira had been poisoned while at the VAMC.

In November 1998 Gilbert was indicted and charged with several counts of murder and assault with intent to murder. The indictment was sealed for seven days so that the families of the victims could be informed. Following a lengthy jury trial, Gilbert was convicted of three counts of first degree murder (including Skwira's), one count of second degree murder, and other lesser charges. She is currently serving a life sentence without the possibility of parole.

III.

The Federal Tort Claims Act's statute of limitations provides, in pertinent part, that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). To facilitate the filing of administrative claims against government agencies, the Department of Justice has developed a standardized form, SF-95, which satisfies the statute's notice of claim requirement. A potential claimant has two years after her claim accrues to complete and submit this two-page form. *See* 28 C.F.R. § 14.2(a); *Corte-Real* v. *United States*, 949 F.2d 484, 485 (1st Cir. 1991). We have previously noted that the burden of preparing this form is minimal. *See Santiago-Ramirez* v. *Sec'y of Dept. of Def.*, 984 F.2d 16, 19 (1st Cir. 1993) ("This Circuit approaches the notice requirement leniently."). The claimant need only indicate on the SF-95 "(1) sufficient information for the agency to investigate the claims, and (2) the amount of damages sought." *Id.*

The Skwira family filed its SF-95 form and supporting materials on October 21, 1999. The Veterans Administration notified the family in correspondence dated May 18, 2000, and July 17, 2000, that the family's administrative claims had been denied.[6] The Skwira family subsequently filed the instant action in the district court on October 26, 2000. Listed as plaintiffs were Statia Skwira (as administratrix of Skwira's estate and in her own right), and Skwira's three adult children — Philip Skwira, Edward Skwira, Jr., and Marsha Yarrows. The complaint sounded in negligence,[7] and sought damages for wrongful death, conscious pain and suffering, personal injury, loss of consortium, and negligent infliction of emotional distress.

Soon after the complaint was filed, the litigation was stayed pending the outcome of Gilbert's criminal trial. Once Gilbert was convicted in March 2001, the parties conducted limited discovery on the issue of the plaintiffs' compliance with § 2401's two-year filing requirement. After the completion of this limited period of discovery, the United States moved to dismiss the complaint on the ground that the plaintiffs' administrative claim had not been timely filed. The government argued that the Skwira family's claim accrued at the time of Skwira's death. In the alternative, the government argued that the claim accrued in October 1996, when the investigators first approached the family and asked permission to exhume and autopsy Skwira's body as part of an ongoing investigation into suspicious deaths at the VAMC. In response, the Skwira family contended that their claim did not accrue until June 8, 1998, when they were told for the first time that Skwira had died as a result of an illegally administered dose of epinephrine.

On June 11, 2002, the district court, in a thorough and well-reasoned opinion, granted the government's motion to dismiss. After canvassing the background law, the court framed the issue before it:

The pivotal question in each case will be when, as a factual matter, sufficient information was available to the plaintiffs to reveal a connection between the VAMC and the deaths.

Cutting, 204 F. Supp. 2d at 227-28. The court determined that for the Skwira family, that date was November 26, 1996 — the day after the autopsy — when the family first learned that Skwira did not die of a heart attack, as the death certificate and the VAMC had maintained. Thus, the court reasoned, the Skwira family had two years from that date — until November 1998 — to file an administrative claim with the Veterans Administration. Since the family had failed to file a claim before that deadline, the

court concluded that it lacked subject matter jurisdiction and dismissed the complaint. This appeal ensued.

IV.

As the language of § 2401 unequivocally indicates, the failure to file an administrative claim with the appropriate government agency within two years of a claim's accrual results in that claim being "forever barred." 28 U.S.C. § 2401(b). It is well settled in this circuit that the timely filing of an administrative claim pursuant to § 2401 is a jurisdictional prerequisite to filing suit under the FTCA. *See, e.g., Gonzalez* v. *United States*, 284 F.3d 281, 287 (1st Cir. 2002); *Attallah* v. *United States*, 955 F.2d 776, 779 (1st Cir. 1991); *Gonzalez-Bernal* v. *United States*, 907 F.2d 246, 248 (1st Cir. 1990). Thus, failure to comply with the FTCA's statute of limitations means that the district court lacks subject matter jurisdiction to entertain the suit and must dismiss it. *Coska* v. *United States*, 114 F.3d 319, 323 n.8 (1st Cir. 1997). The Skwira family, as "the party invoking the jurisdiction of a federal court[,] carries the burden of proving its existence." *Murphy* v. *United States*, 45 F.3d 520, 522 (1st Cir. 1995).[8]

In this case, the district court dismissed the Skwira family's complaint on the government's Rule 12(b)(1) motion. *See* Fed. R. Civ. P. 12(b)(1) (providing for dismissal of claim for "lack of jurisdiction over the subject matter'").[9] We use "different standards of review in evaluating a district court's dismissal for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) depending on the circumstances." *Gonzalez*, 284 F.3d at 287. In a situation where the parties dispute the predicate facts allegedly giving rise to the court's jurisdiction, the district court will often need to engage in some preliminary fact-finding. In that situation, the district court "enjoys broad authority to order discovery, consider extrinsic evidence,

and hold evidentiary hearings in order to determine its own jurisdiction." *Valentín* v. *Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).[10] In such a case, the district court's findings of fact will be set aside only if clearly erroneous. *Id.* at 365. The court's ultimate conclusion regarding the existence vel non of subject matter jurisdiction is a question of law subject to de novo review. *Id.* In this appeal we are only reviewing the district court's ultimate legal conclusion that the Skwira family's action is time-barred. Indeed, the government and the Skwira family both maintain, without elaboration, that we should review de novo the district court's dismissal. We take this position as a concession that the parties do not dispute the district court's factual findings as recited in its written opinion,[11] and that they only disagree over the legal significance of those findings — i.e., the district court's determination that, as a matter of law, the plaintiffs' complaint was time-barred. Hence, since the parties' dispute "focuses on pure (or nearly pure) questions of law, [it] engenders de novo review." *Gonzales*, 284 F.3d. at 287; *see Valentín*, 254 F.3d at 365 ("Because the facts are not in issue, the court's determination engenders de novo review."); *id.* at 363 (noting that jurisdictional challenges grounded in considerations of sovereign immunity normally "present what amount to pure (or nearly pure) questions of law") .

V.

A. Preliminary Considerations

It is "elementary" that the United States, as sovereign, is immune from suit unless it has consented to be sued. *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). While the concept of sovereign immunity has its origins in the English common law, see *Maysonet-Robles*

v. *Cabrero*, 323 F.3d 43, 54 (1st Cir. 2003) ("The King can do no wrong."), the Supreme Court has recognized that sovereign immunity is also grounded in important public policy considerations. *See Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949) ("[T]he interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief.") (quoting *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)); *United States* v. *U.S. Fid. & Guar. Co.*, 309 U.S. 506, 514 (1940) ("Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."). Hence, any waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); *see Soriano* v. *United States,* 352 U.S. 270, 276 (1957) ("[T]his Court has long decided that limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied.").

The FTCA expressly waives the government's sovereign immunity, permitting individuals to sue the government "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b). The FTCA, however, carefully circumscribes that waiver. One of the many constraints placed on it is a statute of limitations: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." *Id.* § 2401(b). As with all waivers of sovereign immunity, the Supreme Court has warned that this limitation, which requires a timely presentation of tort claims against the government, must be strictly construed. *See United States* v. *Kubrick*, 444 U.S.

111, 117-18 (1979) ("[I]n construing the statute of limitations, which is a condition of that waiver, we should not take it upon ourselves to extend the waiver beyond that which Congress intended.").

At issue in this case is the date on which the plaintiffs' tort claims "accrued." If the plaintiffs filed their administrative claim more than two years after their claim accrued, their cause of action is time-barred. "The general rule, within the meaning of the FTCA, is that a tort claim accrues at the time of the plaintiff's injury." *Attallah*, 955 F.2d at 779; *see Kubrick*, 444 U.S. at 120; *Gonzalez*, 284 F.3d at 288. Therefore, under this traditional rule, the Skwira family's claim would have accrued at the time of Skwira's "injury" — i.e., his death — in February 1996. *See Restatement (Second) of Torts* § 899 cmt. c (1979) ("A cause of action for death is complete when death occurs.").

In *Kubrick*, however, the Supreme Court recognized that a "'discovery" rule applies in the context of medical malpractice claims. *See* Part V.B, *infra*. Under this rule, a claim "accrues" when an injured party "knows both the existence and the cause of his injury." *Kubrick*, 444 U.S. at 113. Quoting extensively from the *Restatement (Second) of Torts*, the Court in *Kubrick* identified the two rationales for a discovery rule in medical malpractice actions:

> One is the fact that in most instances the statutory period within which the action must be initiated is short — one year, or at most two, being the common time limit. . . . but since many of the consequences of medical malpractice often do not become apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy. The second reason is that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff

is forced to rely on what he is told by the physician or surgeon.[12]

Kubrick, 444 U.S. at 121 n.7 (quoting *Restatement (Second) of Torts* § 89 cmt. e (1979)); *see Ware* v. *United States*, 626 F.2d 1278, 1284 n.4 (5th Cir. 1980) ("Courts created the medical malpractice [discovery rule] to protect those who suffered damage arising out of both a specialized area, medicine, and a unique relationship, doctor-patient.").

The courts of appeals have applied versions of *Kubrick's* discovery rule in settings other than medical malpractice and latent disease. See, e.g., *Lhotka* v. *United States*, 114 F.3d 751, 753 (8th Cir. 1997) (trespass and nuisance); *Stoleson* v. *United States*, 629 F.2d 1265, 1268-69 (7th Cir. 1980) (occupational safety). The majority of courts that have considered the issue since *Kubrick* have concluded that a discovery rule can apply in wrongful death actions, even if that action is not premised on a claim of classic medical malpractice. *See, e.g:, Garza* v. *U.S. Bureau of Prisons*, 284 F.3d 930, 934 (8th Cir. 2002); *Diaz* v. *United States*, 165 F.3d 1337, 1340 (11th Cir. 1999); *Gould* v. *U.S. Dept. of Health & Human Svcs.*, 905 F.2d 738, 743 (4th Cir. 1990); *In Re Swine Flu Prods. Liab. Litig.*, 764 F.2d 637, 639 (9th Cir. 1985); *Drazan* v. *United States*, 762 F.2d 56, 59 (7th Cir. 1985); *Barrett* v. *United States*, 689 F.2d 324, 329-30 (2d Cir. 1982). *But see Garrett* v. *United States*, 640 F.2d 24, 26 (6th Cir. 1981) (declining to extend discovery rule to wrongful death action).

We have already extended the reasoning of *Kubrick* far beyond the medical malpractice realm. *See Attallah*, 955 F.2d at 778-79 (theft). Noting this fact, the government argues that two recent Supreme Court Cases, *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001), and *Rotella* v. *Wood*, 528 U.S. 549 (2000), mandate that we retreat from our

post-Kubrick application of a discovery rule outside the medical malpractice and latent disease contexts. According to the government, a strict time-of-injury rule should apply in this wrongful death case. We disagree.

Although the Supreme Court held in *TRW Inc.* that under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, a claim accrues at the time of injury, not when the injury is discovered, the Court noted that the FCRA, a complex statutory scheme, had a statute of limitations which already contained a built-in discovery exception for willful misrepresentation. *TRW Inc.*, 534 U.S. at 30; *see* 15 U.S.C. § 1681p. Thus, according to the Court, since the FCRA "explicitly delineates the exceptional case in which discovery triggers the two-year statute of limitation," any further extension of the FCRA's discovery rule should come from Congress, not the Court. *TRW Inc.*, 534 U.S. at 23. By comparison, the FTCA's statute of limitations contains no such built-in exception. *See* 28 U.S.C. § 2401(b). Moreover, liability under the FTCA is premised on general principles of the common law of torts, and not on a statutorily created right.

In *Rotella*, the Court actually applied a discovery rule outside the medical malpractice context, holding that a claim under civil RICO does not accrue when the plaintiff learns of the conspiracy, but, rather, when he learns of his injury. *See Rotella,* 528 U.S. at 556. Indeed, the Rotella court noted that lower federal courts "generally apply a discovery rule when a statute is silent on the issue." *Id.* at 555. "But," the court continued, "we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.*

Thus, we reject the government's position that a strict time-of-injury rule should apply outside the medical malpractice and latent disease contexts, and we have no reservations about applying a discovery rule to this

wrongful death action. The more difficult questions are the nature of that discovery rule and its applicability to the facts of this case. We now turn to those questions.

B. *United States* v. *Kubrick*

Given the importance of the Supreme Court's reasoning in *Kubrick* to the application of a discovery rule, we must discuss that decision in some detail. William Kubrick sought treatment in a Veterans Administration hospital in April 1968 for an infection of his leg. His treating physician prescribed large doses of the antibiotic neomycin. Approximately six weeks after the treatment, Kubrick began to suffer from tinnitus and loss of hearing. He saw other doctors about the new condition, and they diagnosed it as bilateral nerve deafness. In January 1969 another physician, upon reviewing Kubrick's previous medical records, informed Kubrick that it was "highly possible" that the hearing loss resulted from the neomycin treatment. In June 1971 another physician told Kubrick that the neomycin had, in fact, caused the hearing problem and that its administration was medical negligence.

In 1972 Kubrick filed his administrative claim. The issue before the Supreme Court was whether the plaintiff's claim accrued when he first began (in 1968) to suffer from hearing loss, when he learned (in 1969) that the treatment probably caused his hearing loss, or when he was told (in 1971) that the treatment definitively caused his hearing loss and that the treatment was negligent. The district court had held that Kubrick's claim accrued only when he had reason to suspect that a legal duty to him had been breached, i.e., in 1971, and that his claim (filed in 1972) was timely. The Court of Appeals affirmed, ruling that even though Kubrick knew of his injury and

the government's probable responsibility for it as early as 1969, his claim did not accrue until he had adduced "facts which would have alerted a reasonable person to the possibility that the treatment was improper." *Kubrick*, 444 U.S. at 116 (quoting *Kubrick* v. *United States*, 581 F.2d 1092, 1097 (3d Cir. 1978)).

Although the Supreme Court accepted the appropriateness of a discovery rule for medical malpractice cases, it nevertheless reversed, holding that Kubrick's claim did not accrue in 1971 when he learned that his injury was the result of negligence. Instead, the Court held that his claim "accrued" in 1969 when he first learned of his injury and its probable cause. The Court explained:

We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.

Kubrick, 444 U.S. at 123.

Kubrick, therefore, answered one important question that had divided the courts: whether the accrual of a claim depended on a victim's actual knowledge of negligence. *See Kubrick*, 444 U.S. at 121 n.8 (overruling cases cited therein). The court answered that question in the negative. However, the Court's recognition in *Kubrick* of a discovery rule raised new questions, such as: (1) does a discovery rule apply beyond the medical malpractice context, and (2) what knowledge short of actual knowledge of

negligence provides a sufficient factual basis to trigger accrual under a discovery rule. As indicated above, the former question has been answered in the affirmative by several circuits, including our own. The latter question, however, has dogged federal courts ever since *Kubrick*. *See* Kent Sinclair & Charles A. Szypszak, *Limitations of Action Under the FTCA: A Synthesis and Proposal*, 28 Harv. J. on Legis. 1, 17-18 (1991) ("[T]he Court left unclear . . . whether the statute commences only when a plaintiff has actual knowledge of an injury and its cause .... [and] the Court did not address other situations where application of the diligence discovery rule may be difficult due to unique factual considerations."); *see also Cutting*, 204 F. Supp. 2d at 224 ("The issue of precisely how much knowledge is needed to trigger accrual bedevils discovery rule analysis.").

C. The Accrual Standard

In *Kubrick*, the plaintiff's knowledge of his injury (deafness) and its probable cause (the administration of neomycin) provided the factual basis for his claim. *See Kubrick*, 444 U.S. at 114. This knowledge alone triggered the two-year statute of limitations because, with knowledge of the injury and its probable cause, the plaintiff "need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action [for medical malpractice]." *Id.* at 123. In the medical malpractice context, where the *personal* identity of the treating physician is usually known to the patient, knowledge of the *legal* status of the physician as a federal employee is not required for claim accrual. Absent extraordinary circumstances, "[t]he statute of limitations under the FTCA . . . does not wait until a plaintiff is aware that an

alleged tortfeasor is a federal employee."[13] *Gould*, 905 F.2d at 745; *see Gonzalez*, 284 F.3d at 292 (rejecting argument that "the statute of limitations should be tolled on the ground that the plaintiff was unaware of the defendants' status as federal employees"); *Gould*, 905 F.2d at 743 ("Nowhere in *Kubrick* is any reference to the legal identity of the tortfeasor."). Presumably, a reasonably diligent plaintiff, once he is aware of his injury and its probable medical cause, can discover within the two-year statute of limitations period the employment status of his treating physician, as well as the negligence basis for a legal claim. Therefore, in the medical malpractice context, where there is often a direct relationship between the patient and doctor, one need not know of a governmental causal connection for a claim to accrue under the FTCA.

Outside the medical malpractice context, however, the identity of the individual (s) responsible for an injury may be less evident, and a plaintiff may have less reason to suspect governmental involvement. Not surprisingly, courts of appeals have been slightly more forgiving in these cases, deferring the accrual of claims until a reasonably diligent plaintiff has reason to suspect a governmental connection with the injury. For example, Gloria Garza Regalado was murdered by her husband shortly after he had escaped from the City of Faith halfway house in Monroe, Louisiana. The administrator of Regalado's estate filed suit in state court against the City of Faith, alleging negligence in the home's failure to notify law enforcement and Regalado of her husband's escape. Over the course of discovery, the administrator learned that the person responsible for notifying law enforcement of the escape was a federal Bureau of Prisons employee. The administrator subsequently filed suit in federal court against the Bureau under the FTCA. According to the Eighth Circuit, the estate's claim did not accrue when the

administrator knew of the injury (i.e., death) and its cause (i.e., murder). Rather, the court indicated that a claim would accrue once the plaintiff has "reason to believe he ha[s] been injured by an act or omission *by the government*." *Garza*, 284 F.3d at 934 (emphasis added).

The Eleventh Circuit has formulated its accrual standard in similar terms, holding that a wrongful death action accrues "when the plaintiff knows, or exercising reasonable diligence should know, both of the decedent's death and its *causal connection with the government*." *Diaz*, 165 F.3d at 1340 (emphasis added). We agree with these courts that, outside the medical malpractice context,[14] the proper subject of knowledge for accrual purposes under the FTCA is (1) the fact of injury and (2) the injury's causal connection with the government. As the preceding quote from *Diaz* makes clear, there is, of course, a reasonable diligence component to this knowledge requirement. A plaintiff may not "bury her head in the sand." *Id.* at 1339. If she fails to undertake a reasonably diligent investigation into the cause of injury, the law will impute to her an awareness of any knowledge that she would have uncovered if she had undertaken that inquiry. *See Kubrick*, 444 U.S. at 123-24 & n.10.

Having determined the knowledge content that triggers accrual outside the medical malpractice context (knowledge of injury by an act or omission of the government), we must next ask how certain this knowledge must be. The Supreme Court indicated in *Kubrick* that definitive knowledge of the cause of injury is not required to trigger the accrual of a medical malpractice claim: "It is undisputed in this case that in January 1969 Kubrick was aware of his injury and its *probable* cause," and that knowledge, according to the Court, formed the "factual predicate for a claim." *Kubrick*, 444 U.S. at 118 (emphasis added); *see also id.* at 114 ("Dr. Sataloff . . . in January

1969 [ ] informed Kubrick that it was *highly possible* that the hearing loss was the result of the neomycin treatment.") (emphasis added).

Following *Kubrick*, we have similarly indicated that something less than definitive knowledge is required. For example, we have also stated that a medical malpractice claim has accrued "[o]nce a plaintiff knows of the injury and its *probable* cause." *Gonzalez*, 284 F.3d at 289 (emphasis added); *see also id.* at 291 n.10 (indicating that claim accrues when "plaintiff was on notice of the injury and its *potential* cause") (emphasis added). Outside the medical malpractice context, courts have similarly indicated that something less than definitive knowledge is required. In *Garza* the court stated that a claim accrues once the plaintiff "had reason to believe" that the government was responsible for the injury. *Garza*, 284 F.3d at 935. The court in *Diaz* said that "in order for the claim to accrue, a plaintiff must have some indication that there may have been a government cause of the injury." *Diaz*, 165 F.3d at 1340. In *Ramming* v. *United States*, 281 F.3d 158 (5th Cir. 2001) (per curiam), the Fifth Circuit said that a claim accrues once a plaintiff has "knowledge of facts that would lead a reasonable person [] to conclude that there was a causal connection." *Id.* at 163.

In assessing these varying formulations, we are mindful of the emphasis in *Kubrick* that the knowledge which triggers accrual (and hence the running of the statute of limitations) is the discovery of sufficient facts about the injury and its cause to prompt a reasonable person to inquire and seek advice preliminary to deciding if there is a basis for filing an administrative claim against the government: "A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community."[15] *Kubrick*, 444 U.S. at 123. The degree of knowledge of injury and cause that would prompt a reasonable person

to take these protective steps will vary with the circumstances of the case, but, in any event, conclusive knowledge is not necessary. Hence, in line with the best precedents, we hold that, outside the medical malpractice context, a claim accrues under the FTCA once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury.

Our dissenting colleague claims that this holding contravenes *Kubrick* and its progeny — described as a clear, unbroken line of authority that has "firmly established that the baseline threshold for accrual under the discovery rule is knowledge of an injury and its cause," with cause defined as "the immediate physical basis for the injury." Respectfully, there is no such unbroken line of authority that supports this formula. Courts of appeals have, in fact, struggled to apply the discovery rule of *Kubrick* outside the medical malpractice context, *see Szypszak, supra*, at 30, and cases cited therein ("However useful courts may have found *Kubrick* in deciding cases with similar facts, they continue to apply the diligence discovery rule to dissimilar cases in an ad hoc manner."), and a rule that may seem forgiving in one scenario can be harsh in another. The case primarily relied upon by the dissent for its formula, *Dyniewicz* v. *United States*, 742 F.2d 484 (9th Cir. 1984), illustrates these difficulties well.

The *Dyniewicz* plaintiffs' parents were killed during a flash flood on a highway that the plaintiffs claimed should have been closed due to hazardous conditions. Despite actively pursuing a claim against the state, the plaintiffs did not learn of possible federal governmental responsibility until over two years after their parents' deaths. The Ninth Circuit, affirming the district court's dismissal of the case, imposed a strict rule that once "the

immediate physical cause of the injury is discovered," an FTCA plaintiff's claim accrues even if the involvement of the federal government in the injury is unknown. *Dyniewicz*, 742 F.2d at 486. Since there was no dispute that the immediate physical cause of the parents' injury was drowning, the Ninth Circuit held that the plaintiffs' claim was time-barred. *Id.* at 487. Under the rule we articulate today, however, the plaintiffs' claim would not necessarily have been time-barred. Moreover, in a subsequent case, the Ninth Circuit indicated that the rule we find in the cases is supported by the language of *Kubrick*. *See Gibson* v. *United States*, 781 F.2d 1334, 1344 (9th Cir. 1986) (quoting *Kubrick*, 444 U.S. at 122 ("[T]he prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury.") (emphasis added)). The *Gibson* court, however, rejected the plaintiffs' request for such a rule, indicating that *Dyniewicz*, as binding precedent, forced the imposition of the harsher rule. *See Gibson*, 781 F.2d at 1344 ("[B]inding circuit precedent forecloses us from considering such an extension of *Kubrick*.").

Moreover, the *Dyniewicz* rule proposed by the dissent is inconsistent with our holding in *Attallah*. In that case, a courier transporting currency on behalf of the plaintiffs was abducted, robbed, and murdered in Puerto Rico in September 1982 shortly after arriving at the local international airport. *Attallah*, 955 F.2d at 778. The decomposed body of the courier was found in a nearby rain forest soon thereafter, and the local police advised the plaintiffs that they had no leads as to who was responsible for the criminal acts. Almost five years later, in May 1987, a federal grand jury returned an indictment against two former agents of the U.S. Customs Service, alleging that they were responsible for the murder and robbery of the courier. In January 1988 the plaintiffs filed an adminis-

trative claim for the loss of the currency possessed by the courier at the time of his abduction.

On appeal, the government argued that the plaintiffs' claim was time-barred since it was filed almost six years after the plaintiffs knew of their injury. The government, advocating for a rule such as that found in *Dyniewicz*, argued that the plaintiffs were aware of their injury and its cause on or about September 20, 1982, when the body of the murdered courier was found; hence, the claim accrued at that point. Rejecting this argument, we concluded that under the circumstances of that case, the plaintiffs' claim accrued at the time of the indictment against the former agents because the plaintiffs "did not know, nor in the exercise of reasonable diligence could have known of the Customs agents' criminal acts until the time of their indictment." *Id.* at 780.[16] By way of contrast, if, as our dissenting colleague posits, "knowledge of cause" for accrual purposes means knowledge of "the immediate physical basis for the injury," then *Attallah* was wrongly decided since the plaintiffs in *Attallah* knew that their employees had been murdered and robbed within days of their disappearance. *See Attallah*, 955 F.2d at 778. We held otherwise, however, since the plaintiffs had no indication that government employees were responsible for their loss until an indictment had been filed. Here, unlike the plaintiffs in *Attallah*, the Skwira family had indications of government involvement well before investigators told them definitively that Gilbert had poisoned Skwira.

D. Application of the Accrual Standard

In some applications of the discovery rule to the question of accrual, there will be an issue about the reasonable diligence of the plaintiff in investigating the fact and cause of her injury. In the Skwira family's case, their rea-

sonable diligence is not at issue. Rather, we can resolve the question of accrual, as did the district court, on the basis of the information the family received from government officials and the local press, prior to any independent inquiry undertaken by the family. The district court concluded that the Skwira family's cause of action accrued, at the latest, the day after Skwira's autopsy (in November 1996), when the family first learned that Skwira did not die of the causes listed on his death certificate. By that point in time, the family had knowledge of the numerous press reports describing an ongoing investigation into the unusually high number of deaths in the same ward in which Skwira died. Those reports indicated that the actions of a particular nurse were the focus of the investigation. When government investigators asked the Skwira family for permission to exhume Skwira's body, they informed the family that they had "suspicions" about the high number of deaths at the VAMC during a relatively brief window of time that included the period in which Skwira was hospitalized. Finally, the autopsy demonstrated conclusively that the cause of death listed on Skwira's death certificate was incorrect. These accumulated facts provided a sufficient basis in November 1996 for a reasonable person to believe that there was a causal connection between the injury (Skwira's death) and the acts or omissions of a government employee. Therefore, the two-year statute of limitations clock began ticking at that point.

The family's subjective beliefs, described in deposition and trial testimony, reinforces the correctness of this conclusion. Skwira's son Philip testified in his deposition that it was a "surprise" that Skwira had died of a cardiac event since he had been admitted only for treatment of his alcoholism. Skwira's daughter Marsha Yarrows testified at Gilbert's criminal trial that she was "shocked" by

the unexpected news of Skwira's cardiac arrest, and during her deposition she also expressed her belief that his care at the VAMC had been inadequate.

Yarrows also testified during Gilbert's trial that she had read the press reports regarding a murder investigation into deaths on Ward C. She stated that when she read these accounts, "it was like a light bulb went off because I knew that was exactly what had happened to my father." She also testified that after reading the newspaper accounts,

> It — it really bothered me, and even though my father's name wasn't mentioned as being one of the people who was investigated, I knew right then and there that that was exactly what had happened to him, that he was one of those people that they must be investigating the death of.

Despite this realization, and despite the press reports and the information provided by investigators after the autopsy, the Skwira family insists that their claim did not accrue in November 1996 since "[t]he critical facts regarding the existence and cause of [Skwira's] injury were inherently unknowable until June of 1998." The government was in possession of Skwira's heart and tissue samples until that time, and the technology and testing protocols for detecting epinephrine were, by and large, invented for the Gilbert prosecution. Hence, the family argues, there was no way they could have known in November 1996 the actual cause of Skwira's death, and the statute of limitations should be tolled until they did. *See Gonzalez*, 284 F.3d at 288-89 (indicating that statute of limitations may be tolled if "the factual basis for the cause of action [is] 'inherently unknowable' ") (quoting *Attallah*, 955 F.2d at 780).

The Skwira family reads "inherently unknowable" too broadly. The factual basis of a claim is "inherently unknowable" when, as in *Attallah*, there are no facts discoverable through the exercise of reasonable diligence which would permit a plaintiff to reasonably believe that her injury is connected with some act of the government. *See Attallah*, 955 F.2d at 780. As explained above, by November 1996 the Skwira family was aware of press reports concerning the suspicious deaths on Ward C; they knew that the government had begun a criminal investigation into Skwira's death; and they knew that the cause of death printed on Skwira's death certificate was incorrect. This information provided sufficient knowledge to start the limitations clock ticking in November 1996. From that point in time, the family had two years to seek out independent legal and medical advice to determine if they should file an administrative claim against the VA. Moreover, as we explained in Part III, *supra*, to file an administrative claim and preserve one's rights under the FTCA, one need only be in possession of "sufficient information for the agency to investigate the claims." *Santiago-Ramirez,* 984 F.2d at 19.

We realize that "considerable enquiry and investigation may be necessary before [a plaintiff] can make a responsible judgment about the actionability" of her claim. *Rotella*, 528 U.S. at 556. The Skwira family may have felt that need acutely in the difficult circumstances of this case. However, as the Supreme Court noted in *Rotella*, "identifying professional negligence may also be a matter of real complexity, and its discovery is not required before the statute starts running." *Id.* (citing *Kubrick*, 444 U.S. at 122, 124). One does not have to be certain of *actionability* in order to submit an administrative claim.[17] Simply put, the Skwira family failed to meet the modest burden of filing an administrative claim with-

in two years of the claim's accrual.[18] The district court therefore properly dismissed the action.[19]

E. Final Considerations

Before leaving this matter, we must address two additional arguments ably presented in an amicus brief submitted by The American Legion, and not directly addressed in the discussion above. First, amicus argues that we should "apply a rule that a cause of action for death caused by the criminal conduct of a government employee accrues only when there is sufficient information to indict." Such a rule would be a significant expansion of the discovery rule adopted in *Kubrick*. If anything, as noted earlier, the Supreme Court has indicated its reluctance to expand the scope of *Kubrick's* discovery rule. *See TRW Inc.*, 534 U.S. at 28; *Rotella*, 528 U.S. at 556.

Amicus also argues that we should "liberally construe the discovery rule to protect the rights of veterans and their families." We understand the powerful considerations that underlie that argument. However, we are constrained by Supreme Court precedent which unequivocally states that "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano*, 352 U.S. at 276. We must therefore reject the liberal construction advocated by amicus.

VI.

The district court was faced in this case with the unenviable task of telling five families that, despite the tragic deaths of their loved ones at the hands of a government employee, their claims for compensation under the FTCA were time-barred. Understandably, the court

"reluctantly" reached its decision that "as a factual matter, [there was] sufficient information [] available to the [Skwira family and other plaintiffs] to reveal a connection between the VAMC and the deaths" more than two years before they filed their administrative claims. *Cutting*, 204 F. Supp. 2d at 218, 228.

In reviewing the district court's ruling, we have slightly revised the terms of its inquiry, holding that, outside the medical malpractice context, a claim accrues under the FTCA once a plaintiff knows, or in the exercise of reasonable diligence should know, (1) of her injury and (2) sufficient facts to permit a reasonable person to believe that there is a causal connection between the government and her injury. In applying this holding to the facts, we, like the district court, must reluctantly conclude that the Skwira family's claim accrued more than two years before they filed their administrative claim with the VA, and hence their action is time-barred.

AFFIRMED.

APPENDIX

Early February 1996 Skwira is admitted to private healthcare facility for treatment of alcoholism.

February 15, 1996 Skwira is transferred to VAMC; shortly after arriving, Skwira experiences "cardiac event"; Skwira is transferred to Baystate Medical Center for tests and diagnosed with "dissecting aneurysm."

February 16, 1996 Skwira is transferred from Baystate back to VAMC.

February 18, 1996 Skwira expires; death certificate lists causes of death as "dissecting aneurysm," "inferior wall myocardial infarction," "arrhythmia" [sic], and "chronic alcoholism."

July 17, 1996 Press report details investigation into "a higher than usual number of deaths from cardiac arrest."

August 1, 1996 Press report identifies nurse on Skwira's ward as focus of investigation.

August 8, 1996 Press report announces grand jury criminal investigation into deaths occurring between the fall 1996 and winter 1996.

October 2, 1996 Gilbert arrested and charged with phoning in false bomb threats to VAMC.

October 1996 Investigators approach Skwira family and ask permission to exhume Skwira's body as part of ongoing investigation into suspicious deaths at the VAMC; family acknowledges familiarity with press reports concerning investigation.

November 25, 1996 Skwira's body is exhumed and autopsy performed.

November 26, 1996 Investigators inform family that causes of death listed on death certificate were "incorrect."

July 1997 Investigators inform family that chemical ketamine inexplicably found in Skwira's body.

June 8, 1998 Investigators inform family that Skwira died of epinephrine poisoning.

November 19, 1998 Grand jury indicts Gilbert for murder of Skwira and others.

October 21, 1999 Skwira family files administrative claim.

July 17, 2000 Final denial of administrative claim is issued.

October 25, 2000 Jury selection begins in Gilbert criminal trial.

October 26, 2000 Skwira family commences this lawsuit.

March 14, 2001 Gilbert convicted of murdering Skwira.

- Concurring and Dissenting Opinions Follow -

BOUDIN, *Chief Judge*, concurring. Under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680 (2000), the Skwira family was required as a condition of suing the federal government to file an administrative claim within two years of the accrual of their cause of action. Although tort claims customarily accrue at the time of injury, the practice is widespread of providing extra time — either by delaying accrual or tolling the statute where the basis for suit is not apparent when the initial injury occurs. *Villarini-Garcia* v. *Hospital Del Maestro, Inc.*, 8 F. 3d 81, 84-87 (1st Cir. 1933); *Restatement (Second) of Torts* § 899, cmt. e (1979). The *locus classicus* is the sponge left in the patient during surgery.

In *United States* v. *Kubrick*, 444 U.S. 111 (1979), the Supreme Court adopted this so-called discovery rule for a medical malpractice claim against the government under the Federal Tort Claims Act. *Id.* at 122. Since then, most circuit courts to consider the question have been willing to apply the same reasoning to other kinds of claims against the government where, in the nature of things, the prospects of any claim against the government were so hidden that a reasonable plaintiff would not have been alerted to their existence. *E.g., Attallah* v. *United States*, 955 F.2d 776, 780 (1st Cir. 1992); *Osborn* v. *United States*, 918 F.2d 724, 731-34 (8th Cir. 1990).

At the same time, *Kubrick*, like many other discovery rule cases, makes clear that a plaintiff is not entitled to wait until all of the facts in support of the claim are known. *Kubrick*, 444 U.S. at 122-23. Rather, once the plaintiff knows enough to provoke a reasonable person to inquire further, the plaintiff has the duty to investigate. *See Gonzalez* v. *United States,* 284 F.3d 281, 288-91 (1st Cir. 2002). In substance, the plaintiff is charged with

knowing what he might have found out by actively pursuing his bare suspicions and then filing a claim when there are reasonable prospects of liability.

Critically, when the plaintiff knows or should know enough to prompt a claim, he may not yet know enough to win the suit. *Childers Oil Co.* v. *Exxon Co.*, 960 F.2d 1265, 1272 (4th Cir. 1992). To win a suit may require the development of further facts, perhaps even the conduct of discovery and further study by experts. But the discovery rule is a compromise between competing interests; and under the Federal Tort Claims Act, the burden on the plaintiff is peculiarly slight: all that is needed to comply with the statute is the filing of a simple two-page form with the responsible federal agency. 28 U.S.C § 2401(b) (2000); 28 C.F.R. § 14.2 (2002); Claim for Damage or Injury (Standard Form 95), WL 15A Fed. Proc. Forms § 63:22.

It is easy, especially in a case where government was actively investigating, to ignore the importance of the principle of early notice to the putative defendant. The longer the delay between the original wrong and the onset of litigation, the more likely that evidence on the defense side may be lost. Yes, in *this* case, nothing like that occurred; but statutes of limitation (unlike laches) are framed to work mechanically: indeed, one of their benefits is that arguments about *whether* there was prejudice from delay are banished from the scene.

The formulas used in the cases for implementing the discovery rule are neither precise nor consistent. Ultimately the question, highly dependent on the facts, is whether the plaintiff knew enough as to the potential responsibility of the defendant that — within two years of that point — he should have filed the short form apprizing the government of a potential claim against it. Often, in close cases like this one, this is a jury issue — but not

in a suit against the government. 28 U.S.C. § 2402 (2000); *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981) (no right of jury trial for tort claims against the federal government).

In this case, the district court carefully analyzed the undisputed raw facts. Those confirm that by mid-1996, the Skwira family had learned that other suspicious deaths had occurred at the hospital in addition to the wholly unexpected sudden death of Edward Skwira, that a government investigation involving the U.S. attorney and the state police was underway, that Skwira's exhumation was necessary, and that (based on the autopsy) the death certificate had misstated the cause of death. And, of course, it was known that the hospital was run by the federal government.

At this point, a reasonable person would have believed that some kind of negligence or misconduct by government employees at the hospital *might well* underlie Edward Skwira's death. That some of the plaintiffs actually had such suspicions is not necessary but appears to have been the fact. The Skwiras then had two further years to investigate. Further, on similar evidence the family of one of the other victims did file a claim within the time period allowed. Yet the Skwira family waited over three years after the autopsy report before filing their claim.

The problem in this case is primarily one of applying an abstract (and rather general) concept — adequate notice to trigger the discovery rule — to a unique fact pattern among an endless parade of possibilities. The major peculiarity here is that the Skwira family could probably not have had definitive proof of their claim before the government completed its investigation. This makes the present case highly unusual: normally, as in *Kubrick* itself, one whom suspicions prompt to consult an expert or a lawyer can usually get a good fix on liability within a reasonably brief period.

But under the discovery rule, definitive proof of wrongful conduct and government liability is not required to start the period for filing a claim. *Kronisch* v. *United States,* 150 F.3d 112, 123 n.6 (2nd Cir. 1998), *cert. denied* 531 U.S. 1078 (2000); *Childers*, 960 F.2d at 1272. So the question is whether a further delay should be interpolated into the limitations period for cases in which, though substantial suspicions should have been excited, they could not in the nature of things have been fully satisfied within the next two years. At least one circuit court has been willing to delay the statute while science sorted matters out, *Stoleson* v. *United States*, 629 F.2d 1265, 1268-71 (7th Cir. 1980); on the other hand, filing the claim form, thereby tolling the statute, is not a burdensome task.

Alternatively, some might think that where the government is actively investigating a matter, private parties should be allowed to await the outcome of the official investigation and that the statute should be tolled in the meantime. But this choice too involves competing policy concerns and the engrafting of a judge-made exception upon statutory language that gives no hint of any such reservation. And given the range of government investigations into official and private conduct of all kinds, such an exception could have ramifying consequences that a court cannot easily assess.

Perhaps the Supreme Court will move in the direction of *Stoleson* or of an exception for pending government inquiry, but there are some reasons for a lower court to be cautious. Where the sovereign has consented to be sued for its agents' wrongful acts, the Court has construed reasonably strictly the limits on such consent. *Kubrick*, 444 U.S. at 117-18. *Kubrick* itself reversed a line of circuit precedent that, while adopting the discovery rule, applied it rather too freely. *See id.* at 121 n.8 (collecting cases). Recent Supreme Court decisions have also been quite

respectful of limitations periods. *E.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19 (2001); *Rotella* v. *Wood*, 528 U.S. 549 (2000).

In the end, the risks of prompting persons to file claims too soon seem less weighty than the importance of getting notice to the government at the earliest reasonable opportunity. It is one thing to cut off a claim where no reasonable suspicion existed within the limitations period. But where the claimant thinks or should think that he may well have a claim, then under present law the government should be notified within two years. If the law is to be fine-tuned further, Congress may well be better equipped to devise the options and assess the consequences.

TORRUELLA, *Circuit Judge*, dissenting. I am forced to dissent because the majority contravenes Supreme Court doctrine established in *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979) and longstanding circuit precedent interpreting *Kubrick*. *See Gonzalez* v. *United States*, 284 F.3d 281, 289 (1st Cir. 2002); *Attallah* v. *United States*, 955 F.2d 776, 780 (1st Cir. 1992). The majority's "causal connection" approach runs contrary to the doctrine established in those cases because it eliminates the requirement that before a statute of limitations runs on an FTCA claim, a plaintiff must be aware both of the existence of his injury *and* "the facts of causation." *Kubrick*, 444 U.S. at 122. In this case, the appellants could not possibly have discovered the medical cause of Edward Skwira's death before June 8, 1998. As is established by the record, the government itself was unable to discern the cause of Skwira's death until it invented special techniques and protocols for detecting excess levels of epinephrine in the body. Until June 8, 1998 — the date when the government first informed appellants about "the facts of causation" — the Skwira's were in no position

to know how Skwira had died. Thus, the appellants were in the position described by the Supreme Court as one warranting delayed accrual — that is, where "*the facts of causation* [are] in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122 (emphasis added).

The standard adopted by the majority improperly allows a claim to "accrue" before a reasonably diligent plaintiff could possibly have discovered the medical or physical cause of his injury. According to the majority, a discovery rule claim "accrues" once a plaintiff knows or should, in the exercise of reasonable diligence, know "(1) the fact of injury and (2) the injury's causal connection with the government." *Maj. Op.* at 26. Thus, once injury is known, the statute of limitations begins running as soon as the plaintiff discovers sufficient information to determine that his injury is "probabl[y]" "connected with some act of the government." *Maj. Op.* at 28, 33. The "causal connection" approach, in other words, puts a premium on the identity of the defendant: so long as a plaintiff might determine *who* injured him, the statute of limitations starts to run against a plaintiff, even if he could not, in the exercise of reasonable diligence, discover *what* injured him, or *how* he was injured.

This case presents no basis for implementing a novel accrual standard. The majority alludes to (1) confusion in the standards articulated by *Kubrick* and its progeny, and (2) the unique nature of non-medical malpractice cases as potential justifications for implementing a new accrual standard. *Maj. Op.* 23-25. However, looking at *Kubrick* and its progeny, I think it is clear that our discovery rule jurisprudence, while less than crystal clear, is well established enough that the majority's decision to depart from *Kubrick's* accrual standard in favor of the "causal connection" standard is unwarranted. Moreover, there is nothing in the record that distinguishes this case from past

malpractice and wrongful death discovery-rule cases which have been considered under our well-established accrual standard.

A. *Kubrick* and its Progeny

While *Kubrick* left open some questions regarding the parameters of the discovery rule, the core holding of *Kubrick* is clear and has been repeatedly applied by this and other circuits in both medical malpractice and non-medical malpractice contexts.

The *Kubrick* Court established that accrual does not occur before the plaintiff "knows both the existence *and the cause* of his injury." *Kubrick*, 444 U.S. at 113 (emphasis added). The Court clearly distinguished between "a plaintiff's ignorance of his legal rights" (which will not halt accrual) and knowledge "about the facts of causation" (which is required to trigger accrual). *Id.* at 122. Thus while accrual will not wait for a plaintiff to discover that his injury was *negligently* inflicted, it is clear that a claim cannot accrue before a plaintiff is or should be aware of the existence and cause of his injury. Under *Kubrick*, knowledge of an injury and its cause constitutes "the factual predicate for [the] claim." *Id.* at 118. Thus, as the Fourth Circuit has stated, "[t]he clear import of *Kubrick* is that a claim accrues within the meaning of [the FTCA] when the plaintiff knows or, in the exercise of due diligence, should have known both the existence and the cause of his injury." *Gould* v. *U.S. Dep't of Health and Human Services*, 905 F.2d 738, 742 (4th Cir. 1990).

Even if *Kubrick* ultimately left open questions regarding claim accrual, this Court has repeatedly construed *Kubrick* as holding that a claimant's knowledge of the existence and cause of his injury is the baseline knowledge required to trigger discovery rule accrual. In *Gonzalez*, we recently clarified that *Kubrick* meant that

"[o]nce a plaintiff knows of the injury and its probable cause, he/she bears the responsibility of inquiring among the medical and legal communities about whether he/she was wronged and should take legal action." *Id.* at 289 (citing Kubrick). Our holding in *Gonzalez* is consistent with all of our prior discovery rule cases. *See, e.g., Nicolazzo* v. *United States*, 786 F.2d 454, 454 (1st Cir. 1986) (citing *Kubrick's* holding that in medical malpractice suits, "the claim accrues when a plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the existence and cause of his injury"); *Rivera Fernandez* v. *Chardon,* 702 F.2d 29, 32 (1st Cir. 1983) (finding that the *Kubrick* Court concluded that "the limitations period began to run when the plaintiff knew of the existence and the cause of his injury"); *Lazarini* v. *United States*, 2000 WL 231241 (1st Cir. Feb. 17, 2000) (per curiam) (citing *Kubrick* for the proposition that discovery-rule claims accrue "when the plaintiff knows both the existence and the cause of his injury"); *Fisher* v. *United States*, 1992 WL 63516 at *4 (1st Cir. Apr. 1, 1992) (per curiam) ("The Supreme Court has determined that a plaintiff must know the 'critical facts' of his injury and its cause in order for his cause of action to accrue under the Federal Tort Claims Act.").

The majority's interpretation of *Kubrick* also departs from the discovery rule standard as articulated by nearly every other circuit court. *See, e.g., Massey* v. *United States*, 312 F.3d 272, 276 (7th Cir. 2002) (finding that the *Kubrick* Court held that a claim under the FTCA accrues when the plaintiff knows both the existence and cause of the injury); *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002) (same);[20] *Winter* v. *United States*, 244 F.3d 1088, 1090 (9th Cir. 2001) (same); *Gould*, 905 F.2d 738 at 742 (4th Cir. 1990)(same); *Barren by Barren* v. *United States*, 839 F.2d 987 (3d Cir. 1988) (same);

Chamness By and Through Chamness v. *United States*, 835 F.2d 1350, 1353 (11th Cir. 1988); *Arvayo* v. *United States*, 766 F.2d 1416, 1419 (10th Cir. 1985) (same).[21]

The majority is not free to jettison the "causation" requirement at this stage. Although the discovery rule standards applied in the past may differ slightly from one another,[22] these nominal differences do not justify wiping the slate clean and imposing a more rigorous accrual standard for plaintiffs to satisfy. In sum, it is firmly established that the baseline threshold for accrual under the discovery rule is knowledge of an injury and its cause. Unless the "causal connection" standard satisfies this threshold, it is an unwarranted departure from Circuit precedent.

• What Constitutes the "Facts of Causation?"

The majority's emphasis on *who* caused Skwira's injury, rather than *how* he was injured or *what* injured him is seriously misguided. In light of the long line of cases requiring knowledge of "the facts of causation" to trigger accrual, the only way to sustain the majority's approach would be to argue that its "causal connection" standard actually satisfies this Court's "causation" requirement. However, this argument would require us to construe the term "cause" in a manner inconsistent with legal precedent. Discovery of the cause of one's injury does not mean knowing who is responsible for it, or even discovery of the alleged tortfeasor's "probable connection" to the injury; rather, an injury's "cause" is known when the immediate physical basis for the injury is discovered. *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984). That is, "cause" means the immediate cause of injury "from a medical point of view," and not the legal identity of the alleged tortfeasors. *Gould*, 905 F.2d at 743

n.2; *see also Davis* v. *United States*, 642 F.2d 328, 331 (9th Cir. 1981). This is evident from *Kubrick* itself, where the Court determined that the critical causative fact that set the statute of limitations running was that *Kubrick* was aware of the fact that the administration of an antibiotic was the medical cause of his injury. *Kubrick*, 444 U.S. at 118. Thus, the majority's claim that its "causal connection" approach is grounded in the logic of *Kubrick* is unfounded; as one circuit has noted, "[n]owhere in *Kubrick* is any reference to the legal identity of the tortfeasor." *Gould*, 905 F.2d at 743; *see also Gibson* v. *United States*, 781 F.2d 1334, 1344 (9th Cir. 1986) (knowledge of "cause" is knowledge of immediate physical cause, not knowledge of involvement and culpability of federal agents).

C. Applying *Kubrick* "Outside the Medical Malpractice Context"

Without a trace of irony, the majority also claims that it is free to implement its novel "causal connection" standard because Skwira's injury occurred "outside of the medical malpractice context." *Maj. Op.* at 25. That is, because Nurse Gilbert intentionally injected Skwira with epinephrine, the appellants' claims against the United States merit consideration under a different standard than that applied to other malpractice cases. Since no such standard has been clearly articulated yet by this Circuit, the majority allows itself to invent a new one.

Even if this distinction were generally appropriate, the facts in this case do not permit us to treat it as a purely non-malpractice case. This case involves a medical professional administering an excessive dose of a toxic substance to a patient undergoing treatment at a government hospital. That the drug was administered with the

intent to kill does not itself distinguish this from similar cases involving latent injury or causation, or other cases arising from a breach of the doctor-patient relationship. *Cf. Ware* v. *United States*, 626 F.2d 1278, 1284 n.4 (5th Cir. 1980) ("Courts created the medical malpractice [discovery rule] to protect those who suffered damage arising out of both a specialized area, medicine, and a unique relationship, doctor-patient."). Accordingly, the district court correctly noted, "the facts of this case, charging hospital based negligence or malfeasance, make it functionally identical to a malpractice case." *Cutting* v. *United States*, 204 F.Supp. 2d 216, 224 (D.Mass 2002).

Second, the *rationale* for delaying accrual in medical malpractice cases is entirely appropriate here. As the Supreme Court has noted, "the cry for a discovery rule is loudest" in malpractice cases, because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very hard to obtain." *Rotella* v. *Wood*, 528 U.S. 549, 555-56 (2000) (quoting *Kubrick*, 444 U.S. at 122). Medical malpractice cases enjoy their privileged discovery-rule status not because they are unintentional; we have historically treated these cases differently because they often involve hidden, complex, and unknown factors which an injured plaintiff would not ordinarily be expected to grasp. In this case, where the facts about Skwira's injury were in the control of the government, unavailable until 1998, and impossible to obtain, the rationale for applying the discovery rule is identical to a case of pure medical malpractice. The latent and complex medical causation issues in this case should have led the majority, like the district court below, to treat the appellants' claims under the traditional rubric of medical malpractice discovery rule cases.

D. Applying the Existing Standard to *Skwira*

I respectfully submit that when the proper standard is applied to these facts — that is, when we attempt to ascertain when we could first charge appellants with knowledge of the existence and cause of Skwira's injuries — this case is a much closer one than it appears in the majority opinion.

The plaintiffs, like the government agents investigating Skwira's death, could not possibly have discovered that Skwira died from the administration of a drug until 1998. And unlike the plaintiffs in *Kubrick*, it would have been futile for the Skwiras to inquire "among doctors with average training and experience in such matters to have discovered that [they] probably had a good cause of action." *Kubrick*, 444 U.S. at 123. This fact is significant because "[o]rdinarily, a plaintiff cannot be expected to discover the general medical cause of his injury even before the doctors themselves are able to do so." *Chamness*, 835 F.2d at 1353 (quoting *Rosales* v. *United States*, 824 F.2d 799, 805 (9th Cir. 1987)).

The *only* causative facts in the appellants' possession were knowledge that Skwira's death certificate was incorrect and that the hospital and its employees were the subject of an investigation. However, the sum of this information does not constitute any knowledge regarding the physical cause of Skwira's injury. At most, the plaintiffs knew that everything they thought they knew about Skwira's death was wrong.[23]

The opinion does not cite a single case in support of its harsh conclusion that a claim may accrue before plaintiffs could possibly obtain information about an injury's medical or physical cause. It cites no cases to support treating the appellants' claims any differently from other medical malpractice claims. It disregards the standards articulat-

ed by this Court in *Attallah*,[24] 955 F.2d at 780 and *Gonzalez*, 284 F.3d at 289. Respectfully, it is only by adopting a nebulous "causal connection" test that the panel can make any headway; under *Kubrick's* own "facts about causation" requirement, it would be extremely difficult on this record to show that appellants had sufficient knowledge of the medical cause of Skwira's death.

Knowledge of an injury's cause is a "critical fact," without which a claim cannot accrue. By reducing the "causation" requirement to mean only a "probable connection between the injury and the defendant," the majority puts its thumb on the scale and transforms our accrual standard into one too strict for plaintiffs whose injury involves latent or complex causes. In such cases, "considerable enquiry and investigation may be necessary before [a plaintiff] can make a responsible judgment about the actionability" of his claim. *Rotella* v. *Wood*, 528 U.S. at 556.

The plaintiffs' delay in filing their administrative claim was justified by the impossibility of discovering the cause of Edward Skwira's injury. Because the appellants filed that claim less than two years after discovering the cause of Skwira's injury, I do not believe their claim to be barred by the statute of limitations. I respectfully dissent.

1. There is a time line of the events giving rise to this litigation at the end of this opinion.

2. *See Cutting* v. *United States*, 204 F. Supp. 2d 216 (D. Mass. 2002) (consolidated opinion in *Cutting* v. *United States*, No. 99-40065; *Rauch* v. *United States*, No. 99-30231; *Siska* v. *United States*, No. 00-30080; *McEwen* v. *United States*, No. 99-30232; *Skwira* v. *United States*, No. 00-30192; *Lessard* v. *United States*, No. 00-30076).

3. None of the other four dismissed cases have been appealed.

4. Gilbert's name was made public in connection with that arrest, and she was identified by the local press as the subject of the ongoing investigation into the deaths at the VAMC.

[5] *See Daubert* v. *Merrill Dow Pharms., Inc.*, 509 U.S. 579, 591-93 (1993) (noting that prior to admitting expert testimony, district court must undertake "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue").

[6] The record before us does not indicate why the claims were denied, nor why two separate denial letters issued. We assume the claims were denied because they were deemed untimely.

[7] The complaint alleged a number of theories of negligence, almost all of which amounted to a claim of negligent supervision of Gilbert. For example, the complaint alleged that the VAMC and its staff "allow[ed] improper and lethal medication to be administered to Edward S. Skwira," "fail[ed] to protect Edward S. Skwira from imminent harm they knew or should have known existed," "fail[ed] to properly supervise the medical personnel at the VAMC," and "fail[ed] to monitor and control the usage of and access to the medications at the VAMC, including epinephrine." Secondarily, the complaint also alleged medical malpractice: "failure to provide adequate medical care," and "failure to properly diagnose."

[8] Other circuits view the FTCA's statute of limitations as an affirmative defense, rather than a jurisdictional prerequisite, and therefore place the burden of proof on the defendant. *See, e.g., Hughes* v. *United States*, 263 F.3d 272, 278 (3d Cir. 2001) ("Failure to comply with the statute is 'an affirmative defense which the defendant has the burden of establishing.' ") (quoting *Schmidt* v. *United States*, 933 F.2d 633, 640 (8th Cir. 1991)). Other circuits view the statute of limitations as jurisdictional in nature, and, accordingly, place the burden of proof on the plaintiff. *See, e.g., McCall ex rel. Estate of Bess* v. *United States*, 310 F.3d 984, 987 (7th Cir. 2002) ("[T]he plaintiff [] has the burden of establishing an exception to the statute."); *Gould* v. *U.S. Dept. of Health & Human Svcs.*, 905 F.2d 738, 745-46 (4th Cir. 1990) ("The burden is on plaintiffs to show that due diligence was exercised and that critical information, reasonable investigation notwithstanding, was undiscoverable."). As indicated in the text, we have adopted the latter approach.

[9] *See also* Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[10] In certain situations, the predicate facts can be so inextricably linked to the merits of the controversy that the district court should "defer resolution of the jurisdictional issue until the time of trial." *Valentín*, 254 F.3d at 364 n.3. That is not the case here.

[11] In two brief paragraphs on the penultimate page of the appellants' forty-four page brief — under the heading "The Judge's determination was based on unsupportable findings of fact" — the appellants take issue with the district court's recitation of one fact. The district court stated that Skwira "experienced a severe cardiac event, a dissecting aneurysm." *Cutting*, 204 F. Supp. 2d at 234. The family disputes this "finding." It is clear, however, from the context of the opinion that the district court meant only that the Skwira family was *told* that a dissecting aneurysm was the cause of death (as indicated on the death certificate). Later in its opinion, the court makes clear that Skwira, in fact, died of epinephrine poisoning. *Id.* at 236. Since the appellants have chosen to challenge only this one fact in the district court's opinion, any other objections to the district court's factual findings are forfeited. See *Gonzales-Morales* v. *Hernandez-Arencibia*, 221 F.3d 45, 48 n.3 (1st Cir. 2000).

[12] The Supreme Court had already recognized the former rationale — an injury's latency — as justification for applying a discovery rule under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60. As the *Kubrick* court explained:

> In *Urie* v. *Thompson*, [337 U.S. 163 (1949)], the Court held that a claim under [FELA] did not accrue until the plaintiff's injury manifested itself. In that case, plaintiff Urie contracted silicosis from his work as a fireman on a steam locomotive. His condition was diagnosed only in the weeks after he became too ill to work. The Court was reluctant to charge Urie with the "unknown and inherently unknowable" and held that because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under [FELA] until his disease manifested itself. 337 U.S., at 169-70.

Kubrick, 444 U.S. at 121 n.7.

[13] It would be an extraordinary circumstance if the government or its agents have "misled or deceived a plaintiff, or otherwise hidden the legal identity of alleged tortfeasors as federal employees." *Garza*, 284 F.3d at 935. In that case, accrual of the plaintiff's medical malpractice claim may be deferred, but the plaintiff "must at the very least show that [this] information *could not* have been found by a timely diligent inquiry." *Gonzalez*, 284 F.3d at 291 (original emphasis).

[14] With all due respect to the district court and our dissenting colleague, this case is not "functionally identical" to a medical malpractice case. This case involves a criminal act by a government employee and the claim, primarily, that this employee was negligently supervised at the VAMC. As a matter of proof, the elements of a negligent supervision claim differ significantly from the elements of a medical malpractice claim. See, e.g., *Marpe* v. *Dolmetsch*, 667 N.Y.S.2d 463, 465 (App. Div. 1998); *Zajac* v. *St. Mary of Nazareth Hosp. Ctr.*, 571 N.E.2d 840, 848 (Ill. App. Ct. 1991); *Wright* v. *Univ. Hosp. of Cleveland*, 563 N.E.2d 361, 366-67 (Ohio Ct. App. 1989). Moreover, in a medical malpractice case, knowledge of the federal status of the malpractitioner is irrelevant for accrual purposes. *See Gonzales*, 284 F.3d at 292. As explained in the text, however, courts have relaxed this arguably harsh rule outside the medical malpractice context, thereby emphasizing the importance in the FTCA context of the distinction between medical malpractice and non-medical malpractice cases.

[15] As indicated in Part III, supra, to file an administrative claim under the FTCA (and thereby preserve one's rights), one need only be in possession of "sufficient information for the agency to investigate the claims." *Santiago-Ramirez*, 984 F.2d at 19.

[16] After the disappearance of the courier, the *Attallah* plaintiffs had conducted their own investigation. They visited the Customs Service office at the airport where they were told that the courier had been processed and left the premises. We noted that, "[a]side from this information, appellants had no other source of information regarding the whereabouts of their courier," and that the plaintiffs were not privy to the police investigation. *Attallah*, 955 F.2d at 780.

[17] In the Skwira family's case, if the family had submitted a timely notice of claim, they could have asked the agency to hold the claim in abeyance pending the outcome of the ongoing crim-

inal investigation — or, upon denial of the claim, filed a lawsuit in good faith, "on information and belief," and then ask the court to stay discovery pending the outcome of the ongoing investigation. Indeed, the district court stayed the instant litigation until the end of Gilbert's criminal trial.

[18] The fact that the Skwira family decided to place their trust in the U.S. Attorney's Office, electing not to seek competent independent legal advice until much later, does not alter that conclusion. *See Gonzales*, 284 F.3d at 289 ("[T]he limitations period begins to run regardless of whether plaintiffs make inquiries, and regardless of whether they are correctly advised.").

[19] The district court concluded that one of the other plaintiffs below, Nancy Cutting, successfully filed her administrative claim within two years of its accrual. *See Cutting*, 204 F. Supp. 2d at 228 ("Nancy Cutting's conduct provides a template for reasonable promptness under the discovery rule in these cases."). The government also concedes that Caroline Brandt, the wife of another of Gilbert's victims (and not a party to the litigation below), filed a timely administrative claim, thereby preserving any rights she may have.

[20] The majority's citation of *Garza* to support rejecting the "causation" standard and adopting the proposed "causal connection" standard in its place is inconsistent with that opinion's actual holding. In *Garza*, the Eighth Circuit held that a "cause of action still accrues when the existence of an injury and its cause are known." *Garza*, 284 F.3d at 935. While the *Garza* court did imply that under some circumstances a claim would accrue when the plaintiffs knew the "identity of alleged tortfeasors as federal employees," it imposed this standard *in addition to*, not in place of, the traditional "causation" requirement. See *id.* (suggesting that accrual might be delayed until the plaintiff knows the legal identity of the tortfeasor *only if* government agents mislead or hide the tortfeasor's identity).

[21] To my knowledge, *no* case besides *Diaz* v. *United States*, 165 F.3d 1337 (11th Cir. 1999) has dispensed with the "causation" requirement in the manner proposed by the majority.

[22] For instance, in *Gonzalez*, this Court at one point states that accrual occurs when a plaintiff knows of his injury "and its *probable* cause," 284 F.3d at 283, and at another requires knowledge of "an injury and its *potential* cause.", *Id.* at 291 n.10

(emphasis added). Though I am sure the difference between "probable" and "potential" would provide grist for the mill of an opportunistic litigator, it does not negate our long-standing requirement that accrual is delayed until a plaintiff is aware of the existence and cause of his injury.

[23] The majority makes much of "[t]he family's subjective beliefs," which it gleans from deposition and trial testimony. *Maj. Op.* at 32. Although the majority ostensibly cites the Skwiras' "subjective beliefs" only to "reinforce[] the correctness of [its] conclusion," *id.*, its reliance on what it believes the appellants subjectively knew is inappropriate. The discovery rule test is, of course, an objective one, *Gonzalez*, 284 F.3d at 288; *Attallah*, 955 F.2d at 780, and our assumptions about the state of mind of the appellants are wholly irrelevant as to when the appellants' claim should have accrued. Moreover, none of the family's concerns amount to more than their generalized suspicion about events at the hospital. And as we have held, "generalized suspicions unsupported by medical interpretations do not establish sufficient 'awareness' to set [the] limitations period running when [the] condition involves complex medical causality." *Bath Iron Works Corp.* v. *United States Dep't of Labor*, 2003 WL 21665024 at *6 (1st Cir. July 17, 2003) (quoting *Jasinskas* v. *Bethlehem Steel Corp.* 735 F.2d 1, 5 (1st Cir. 1984)). Inclusion of subjective elements into our discovery rule inquiry will only serve to confuse lower courts seeking to apply the standard announced today.

[24] In *Attallah*, we concluded that "the principles established by the discovery rule warrant a delayed accrual . . . since the appellants did not know . . . of [the tortfeasor's] criminal acts until the time of their indictment." 955 F.3d at 780. We then cited the following factors to justify our decision to delay accrual: (1) the plaintiffs could not have known the factual basis for their claim; (2) the plaintiffs had "no other information" other than misleading information provided by law enforcement; and (3) the police did not have sufficient information to bring charges against the murderers until 5 years after the crime. *Id.* at 780. These factors are all present in some form in the *Skwira* case, and yet the majority does not give them any consideration.

United States Court of Appeals
For the First Circuit

No.02-1988

STATIA A. SKWIRA, as Administratrix of the Estate of Edward S. Skwira, and Individually; MARSHA YARROWS; EDWARD S. SKWIRA, JR.; PHILIP E. SKWIRA,

Plaintiffs, Appellants,

v.

UNITED STATES,

Defendant, Appellee.

ERRATA

The opinion of this court issued on September 15, 2003, should be amended as follows:

On page 44, last paragraph, penultimate line, "Skira's" should be replaced with "Skwira's."

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STATIA A. SKWIRA, Administratrix of the Estate of EDWARD S. SKWIRA, and STATIA A. SKWIRA, MARSHA T. YARROWS, EDWARD S. SKWIRA, JR., and PHILLIP E. SKWIRA, Individually,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION
NO. 00-30192-MAP,

ORDER

June 11, 2002

PONSOR, D.J.

For the reasons stated in the accompanying Memorandum, defendant's motion to dismiss (Docket No. 16) is ALLOWED. The clerk will enter judgment for the defendant.

It is So Ordered.

s/Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NANCY CUTTING, as the Administratrix of the Estate of Kenneth Cutting, and Nancy Cutting and Jeffrey Cutting, individually,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 99-40065-MAP,

FRANCIS B. RAUCH, as Administrator of the Estate of CARL F. RAUCH, JR., and FRANCIS B. RAUCH, Individually,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

CIVIL ACTION NO. 99-30231-MAP,

FRANCIS P. SISKA,
Executor of the Estate
of ANGELO VELLA,
Plaintiff,

v.

UNITED STATES OF
AMERICA,
Defendant.

CIVIL ACTION
NO. 00-30080-MAP,

MICHAEL McEWEN,
Administrator of the
Estate of RALPH L.
McEWEN, JR., and
MICHAEL
McEWEN, Individually,
Plaintiffs,

v.

UNITED STATES OF
AMERICA,
Defendant.

CIVIL ACTION
NO. 99-30232-MAP,

STATIA A. SKWIRA,
Administratrix of the
Estate of EDWARD S.
SKWIRA, and STATIA A.
SKWIRA, MARSHA T.
YARROWS, EDWARD S.
SKWIRA, JR., and
PHILLIP E. SKWIRA,
Individually,
Plaintiffs,

v. CIVIL ACTION
NO. 99-30232-MAP,

UNITED STATES OF
AMERICA,
Defendant.

SUSAN LESSARD,
Administratrix of the
Estate of STANLEY
JAGODOWSKI,
Plaintiff,

v. CIVIL ACTION
NO. 00-30076-MAP,

UNITED STATES OF
AMERICA
Defendant.

MEMORANDUM REGARDING DEFENDANT'S MOTIONS TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION (Civil Action No. 99-40065: Docket No. 28; Civil Action No. 99-30231: Docket No. 17; Civil Action No. 00-30080: Docket No. 19; Civil Action No. 99-30232: Docket No. 17; Civil Action No. 00-30192: Docket 16; Civil Action No. 00-30076: Docket No. 14)

June 11, 2002

PONSOR, D.J.

I. INTRODUCTION

This memorandum addresses the court's power to hear to six civil cases that have been filed under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-80 ("FTCA"). Each of the suits seeks damages for the wrongful death of a patient who died while under the care of the Department of Veterans Affairs Medical Center in Leeds, Massachusetts (the "VAMC"), as a result of the criminal conduct of nurse Kristen Gilbert ("Gilbert").

Gilbert, a one-time employee of the VAMC, was indicted in 1998 for murdering four of her patients and attempting to murder three others by injecting them with the heart stimulant epinephrine. All of the current plaintiffs contend that the United States, through the VAMC, was at least partly responsible for the death of their loved ones. In its present motions, the Government does not address that ultimate issue. Instead, it claims that this court has no jurisdiction to hear these six cases because they were brought outside the applicable statute of limitations. In other words, the Government argues, these lawsuits were filed too late.

It is well established under the law that the United States, as an entity, may be sued only to the extent, and in the manner, that it consents to being sued. It has consented to be sued under the FTCA, but only if the claim is brought within two years after the claim "accrued." According to the Government, these six cases were brought more than two years after their accrual dates, and are therefore barred.

As the following discussion will show, this court is compelled to conclude that the Government is correct with regard to five of the six cases; this court has the power to hear only plaintiff Cutting's case (Civil Action No. 99-40065). Binding authority makes it clear that the other five cases were filed with the Department of Veterans Affairs too late to meet congressional statute of limitations requirements.

The court has reached this conclusion reluctantly, in view of the enormity of the loss suffered by these five plaintiffs and their families. It would, however, be false generosity to ignore a jurisdictional defect that is bound to be fatal to these cases eventually. The court's reasoning is set forth below.

II. GENERAL BACKGROUND

"Because federal courts are courts of limited jurisdiction, federal jurisdiction is never presumed. Instead, the proponent here, the plaintiffs — must carry the burden of demonstrating the existence of federal jurisdiction." *Viqueira* v. *First Bank*, 140 F.3d 12, 16 (1st Cir. 1998). In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(1) challenging subject matter jurisdiction, the court may consider materials outside the pleadings. *See Gonzalez* v. *United States*, 284 F.3d 281, 288 (1st Cir. 2002); *Heinrich* v. *Sweet*, 44 F.Supp.2d 408, 415 (D. Mass. 1999)(noting

that in motion to dismiss for lack of subject matter jurisdiction court "may (1) consider evidence submitted by the parties, such as depositions and exhibits; (2) entertain arguments not raised by the parties' memoranda; and (3) resolve factual disputes, if necessary."). Accordingly, the court has reviewed all the documents submitted in connection with this motion. While the facts particular to each plaintiff will be discussed in Section III below, some general background may be helpful.

The federal investigation into the VAMC began around February 1996. (Civil Action No. 00-30192, Docket 18, Exhibit E at 6). Assistant United States Attorney William Welch ("Welch") was the lead prosecutor, assisted by Special Agent Steven Plante of the Inspector General's Office at the Veterans Administration ("Agent Plante"). *Id.* In June of 1996, Trooper Kevin Murphy of the Massachusetts State Police ("Trooper Murphy") was recruited to assist Agent Plante. *Id.* at 5.

The investigation focused on patients who had died of cardiac arrest between January of 1995 and February of 1996. *Id.* at 7-9. Beginning in the fall of 1996, investigators began approaching families of some of these former patients for permission to exhume the bodies of the deceased. The Skwira family was first, and was approached in October, 1996. *Id.* at 10. From the exhumed bodies, investigators took tissue samples for analysis. *Id.* at 75.

The media began coverage of the investigation in July, 1996. For example, on July 17, 1996, an article in the *Daily Hampshire Gazette* with the headline "VA officials probe deaths" noted that "[a] federal probe into 'a higher than usual numbers of deaths' from cardiac arrest on one ward" of the VAMC was underway. (Civil Action No. 99-30231, Docket 17, Exhibit E). On August 1, 1996, an article in the same newspaper with the headline "VA nurse

said a focus of the probe," disclosed that "investigators probing deaths at the U.S. Department of Veterans Affairs Medical Center are studying the role a nurse played in the care of those who died." *Id.*, Exhibit F. The article noted that while the unnamed nurse had not yet been charged with a crime, she was placed on leave "at about the same time that the VA's Office of Inspector General was called in to investigate what officials feared was a greater number of deaths due to cardiac arrest occurring on a particular ward during a particular shift than on others." *Id.* The same article made it known that the nurse in question had been arrested for trespassing, breaking and entering, and possession of burglary tools, and that her name appeared on the medical records of at least one veteran who had unexpectedly died of a cardiac arrest. *Id.*

In early August, the United States Attorney's Office issued a short press release confirming that, in fact, there was a Grand Jury investigation under way. (Civil Action No. 00-30192, Docket 18, Exhibit D at 25). Around the same time, an August 8, 1996 article in the *Daily Hampshire Gazette* reported that a Grand Jury had been taking testimony for about a month, that the Government had "sufficient information to (have brought) it to a Grand Jury," and that the investigation was "focusing on all deaths that occurred at the VAMC between fall 1995 and winter 1996." (Civil Action No. 99-30231, Docket 17, Exhibit G).

Gilbert was arrested on October 2, 1996 and charged with phoning in false bomb threats to the VAMC. (Civil Action No. 00-30192, Docket 18, Exhibit D at 45). Her name was made public in connection with that arrest, and she was identified by the papers as the subject of the ongoing investigation into the deaths at the VAMC. *Id.* at 45-46.

On October 23, 1997, Caroline Brandt ("Brandt") filed an administrative claim with the Department of Veterans Affairs for the death of her husband. (Civil Action No. 99-30231, Docket 22, Exhibit A). The actions of the Brandt family exemplify a course of conduct that fully satisfied the jurisdictional requirements. Brandt alleged that her husband had inexplicably died of cardiopulmonary arrest, but had no heart problems. *Id.* The claim further alleged that he had a normal pulse and respiratory rate the day of his death, and that "[o]ther suspicious deaths occurred on the same ward at the VA Medical Center from the fall of 1995 to the Spring of 1996." *Id.* Brandt asserted that her husband's death "was the direct result of negligence and/or intentional acts of agent(s) and/or employee(s) of the VA Medical Center in Leeds, MA." *Id.* Gilbert was listed as a witness, but no specific allegations were made against her. *Id.* Following denial of her administrative claim, Brandt filed a timely complaint, which is now pending in this court and which the Government has not sought to dismiss.[1]

It is important to emphasize, in fairness to plaintiffs, that the process of proving that the victims had died of epinephrine poisoning was difficult. Epinephrine occurs naturally in the body as adrenaline, and investigators found it difficult to isolate toxicological evidence that a particular patient had been killed with a lethal injection by examining tissue samples exhumed months or years after the patient's death. Moreover, the tissue examination process was unprecedented, new instrumentation was employed for the first time, and test protocols had to be written. (Civil Action No. 00-30192, Docket 18, Exhibit E at 89). Several doctors and scientists worked with the

[1] Another lawsuit, arising out of the death of Henry Hudon, was filed even earlier, in 1998, C.A.98-30231, and likewise is not the target of any motion to dismiss. Gilbert was eventually found guilty of murdering Henry Hudon.

Government on the toxicological and pathological aspects of the investigation, which was both expensive and time consuming. *Id.* at 84-87.

On May 20, 1998, Nancy Cutting ("Cutting") (Civil Action No. 99-40065) filed an administrative complaint with the Department of Veterans Affairs, alleging that her husband had "died of cardiac arrest caused as a direct result of the negligent and/or intentional acts of agents and/or employees of the VA Medical Center in Northampton, Massachusetts during a period of time up to and including February 2, 1996." (Civil Action No. 99-40065, Docket 28, Exhibit A). As will be seen, this filing satisfied the requirements of the statute of limitations. Following denial of the administrative claim, a timely lawsuit was filed with this court.

In the fall of 1998, the Grand Jury returned an indictment charging Kristen Gilbert with first degree murder and assault with intent to commit murder. The indictment was sealed for seven days so that the families involved could be informed. (Civil Action No. 00-30192, Docket 18, Exhibit E at 30). When the indictment was made public, the other plaintiffs now before the court filed administrative complaints in rapid succession. Francis Rauch ("Rauch") (Civil Action No. 99-30231) filed on December 23, 1998; Francis Siska ("Siska") (Civil Action No. 00-30080) on March 10, 1999; Michael McEwen ("McEwen") (Civil Action No. 99-30232) on March 18, 1999; Susan Lessard ("Lessard") (Civil Action No. 00-30076) on September 29, 1999; and Statia Skwira ("Skwira") (Civil Action No. 00-30192) on October 8, 1999.

Jury selection in the criminal case began on October 25, 2000, and trial commenced on November 20, 2000. On January 4, 2001, this court stayed the pending civil actions until the conclusion of the criminal proceedings. (Civil Action 00-30192, Docket 8 at 2). Gilbert was con-

victed of three counts of first degree murder and various lesser charges on March 14, 2001, and was sentenced to life in prison on March 26, 2001.

III. LEGAL STANDARDS

A. FTCA

As noted above, the United States cannot be sued without its consent. This doctrine of sovereign immunity is "deeply entrenched in American law" and "derives from the common law tradition that the king should be insulated from suit absent his consent." *United States v. Horn*, 29 F.3d 754, 761-762 (1st Cir. 1994). Congress did give its consent to be sued in tort cases — *i.e.* cases seeking damages for death or injury caused by the acts of Government employees — in the FTCA, but with a strict condition: a tort claim is "forever barred" unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). The Supreme Court has noted that this two-year requirement "is the balance struck by Congress in the context of tort claims against the Government." *United States v. Kubrick*, 444 U.S. 111, 117 (1979).

Thus, plaintiffs who wish to seek damages against the United States for injury caused by the negligent or intentional act of a Government employee must initiate the process by presenting an administrative claim within two years after their cause of action accrues. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). "[C]ompliance with this statutory requirement is a jurisdictional prerequisite to suit that cannot be waived." *Id.* Put simply, if a claim is filed too late, the court has no power to hear it. Federal courts derive their power to hear tort claims against the United States from the FTCA and

must dismiss those claims that are not timely filed. *Id.* If the administrative claim is submitted within the proper time, then the Government has six months to review the claim. 28 U.S.C. § 2675(a). If the claim is denied, the injured party then has six months to file a lawsuit. 28 U.S.C. § 2401(b).

In weighing whether a claim has been filed in time, the key question always is: when did the claim "accrue"?

The answer to this question is sometimes simple. "The general rule is that a tort claim accrues at the time of the plaintiff's injury." 284 F.3d at 288. As discussed in more detail below, each of the six plaintiffs in this case was "injured" — through the death of their loved one — more than two years prior to the time that they filed an administrative claim with the Department of Veterans Affairs. Therefore, the Government contends that this court has no subject matter jurisdiction over any of these cases, and that all six complaints should be dismissed.

B. Discovery Rule

Plaintiffs argue that the court's jurisdiction is preserved by the "discovery rule" exception to the usually strict two-year statute of limitations. Although the "discovery rule" has been in existence for some time, the seminal case describing its contours in the context of the FTCA is *United States v. Kubrick*, 444 U.S. 111 (1979). There, the Supreme Court confirmed that the FTCA's statute of limitations may be "tolled" (*i.e.*, held in abeyance) in a medical malpractice case when the plaintiff remained ignorant of (1) the fact that he was injured and (2) the cause of the injury, until less than two years prior to filing his claim. *Id.* at 120. As the Court explained, that a plaintiff "has been injured in fact may be unknown or unknowable until the injury manifests

itself; and the facts of causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain." *Id.* at 122.

Having established this general principle, however, the *Kubrick* Court reversed a Ninth Circuit decision holding that, in effect, a plaintiff's "ignorance of his legal rights" was sufficient to toll the statute of limitations. *Id.* The Supreme Court noted that the *Kubrick* plaintiff knew both that (1) he was injured (he had hearing loss); and (2) that it was "highly possible" that the injury was caused by the treatment he had received at the Government hospital. *Id.* at 114. The Court held that knowledge of injury plus cause was sufficient to start the clock under the discovery rule. *Id.* at 122-123. According to the Court, the plaintiff should have sought "advice in the medical and legal community," *id.* at 123, once he was "in possession of the critical facts that he had been injured and who had inflicted the injury." *Id.* at 122.

Although the discovery rule is primarily applied in the medical malpractice arena, some judges have invoked it in the wrongful death context as well. *See e.g., Heinrich v. Sweet,* 44 F.Supp.2d 408 (D. Mass. 1999)(applying doctrine to a wrongful death claim arising out of boron radiation experiments in the 1960's); *Diaz v. United States*, 165 F.3d 1337 (9th Cir. 1999)(applying doctrine to wrongful death claim arising out of prison suicide). Thus, plaintiffs argue that this court may assert subject matter jurisdiction over their claims, if it finds that they did *not* possess sufficient facts to know that their claims had accrued until they were within the two-year window.

1. **Viability of Discovery Rule**

In response to the plaintiffs' arguments, the Government has offered a rebuttal comprised of several layers. As its first riposte, the Government contends that

recent developments in the law foretell the imminent demise of the "discovery rule" in federal courts, in any form. Since Chief Judge Young decided *Heinrich*, the Supreme Court has addressed the discovery rule in two cases, with increasing levels of negativity.

First, in the context of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the Court recognized that federal courts "generally apply a discovery accrual rule when a statute is silent on the issue." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). However, the Court emphasized that "we have been at pains to explain that discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.* The *Rotella* Court refused to find that the clock did not run on a RICO action until the plaintiff was aware "of the underlying RICO pattern." *Id.* at 557. It held that "[a] RICO plaintiff's ability to investigate the cause of his injuries is no more impaired by his ignorance of the underlying RICO pattern than a malpractice plaintiff is thwarted by ignorance of the details of treatment decisions or of prevailing standards of medical practice." *Id.* at 556-557. *Rotella* explicitly left open the possibility that simple occurrence of the *injury*, regardless of whether the injury was discovered or even discoverable, was sufficient to start the clock. *Id.* at 554 n.2. Thus, *Rotella* stands for the proposition that knowledge of injury alone, at least in the RICO context, is sufficient to start the statute of limitations clock.

Rotella is extremely ominous for plaintiffs here, for two reasons. First, if injury alone starts the two-year clock, regardless of any *knowledge* that the injury has occurred, all the plaintiffs filed their claims too late. Second, even if knowledge of the injury, regardless of any knowledge of *negligence* connected with the injury, is sufficient to start the two-year clock, then plaintiffs' claims

must similarly be dismissed. In a wrongful death claim, plaintiffs, except in the rarest of instances, know of their injury (the death of the loved one) virtually immediately. All the plaintiffs in these cases knew of their decedents' deaths shortly after they occurred. In other words, all the plaintiffs clearly had "knowledge of the injury" more than two years before they filed their claims. Developing Supreme Court authority suggests that these facts alone may doom plaintiffs' claims.

The Court addressed the discovery rule again in 2001. In *TRW Inc. v. Andrews*, 122 S.Ct. 441 (2001), the Court rejected a finding that the discovery rule was applicable to the Fair Credit Reporting Act ("FCRA"). *Id.* at 444. The Court noted that the FCRA had an explicit exception to its statute of limitations; therefore, no implicit exception could be read in. *Id.* Justice Ginsburg, writing for a seven justice majority, also made several observations that are relevant here. First, she noted that the Supreme Court had "not adopted as [its] own" the proposition that federal courts should apply "a discovery accrual rule when a statute is silent on the issue." *Id.* at 447. Second, she noted that the Supreme Court had only recognized the discovery rule in two contexts, "latent disease and medical malpractice, 'where the cry for such a rule is loudest.' " *Id.* Third, she appeared to suggest, in passing, that even where the discovery rule applied, accrual would always occur upon the plaintiff's knowledge of *injury*, regardless of any knowledge of the cause of the injury. *Id.* at 448. Justices Scalia and Thomas made it clear, concurring in the judgment, that they thought even "[t]he injury-discovery rule . . . is bad wine of recent vintage." *Id.* at 452. Under the law as these two justices saw it, the limitations clock would always start when the injury occurred, regardless of whether the plaintiff even knew of the injury. *Id.*

Thus, the Government argues that in the wrongful death context the two-year clock must always begin to run at the time of death. Unlike the latent disease or medical malpractice context, there is, as noted above, virtually no possibility that the injury will occur substantially before discovery of the injury; death is rarely a hidden or latent injury that a plaintiff will need time to "discover." Starting the clock at the time of death would facially accord with the *Rotella* Court's admonition that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock," 528 U.S. at 555, and the TRW Court's refusal to recognize the discovery rule outside the latent disease and medical malpractice contexts. 122 S.Ct. at 447.[2]

While the Government points to indications of a possible change in federal law in this area in the future, this court will decline the invitation to discard the discovery rule in the wrongful death context in the absence of clearer authority. A guiding principle for federal trial judges is that "absent clear indication from the Supreme Court itself, lower courts should not lightly assume that a prior decision has been overruled *sub silentio* merely because its reasoning and results appear inconsistent with later cases." *Williams v. Whitley*, 994 F.2d 226, 235 (5th Cir. 1993). This is doubly true when there is no explicit inconsistency, but merely a tentative indication of potential developments. Thus, *Kubrick* is good law, and discovery of injury alone is not sufficient to start the clock, at least in the medical malpractice context.

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[2] Indeed the Government's proposal is the rule in Massachusetts. The Commonwealth recognizes no "discovery rule" in the wrongful death context; the limitation period starts to run upon death, with no exceptions. *Pobieglo v. Monsanto Co..*, 402 Mass. 112, 116 (1988).

Moreover this court will not assume that the application of the discovery rule in the wrongful death context is unwarranted, simply because no Supreme Court or First Circuit case contains an explicit holding to that effect.

For one thing, the facts of this case, charging hospital-based negligence or malfeasance, make it functionally identical to a malpractice case. In addition, the Eighth Circuit, despite evolving Supreme Court jurisprudence, recently applied the discovery rule in the wrongful death context. *See Garza v. United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002). In sum, despite the Government's strong arguments, this court concludes that all plaintiffs survive the defendant's first salvo.

2. **Duty to Inquire**

The Government's second, and more effective, argument is that plaintiffs simply failed to file their lawsuits within two years after they had both knowledge of their injuries and sufficient indication of the injuries' cause. Some background will put this issue in context.

Once the Government has shown that the plaintiff's suit was facially time-barred, as in this case, the burden shifts to the plaintiff. To toll the clock under the discovery rule, "the plaintiff may show that he had no reason to believe he had been injured by an act or omission by the government." *Garza*, 284 F.3d at 934. Thus, the question for plaintiffs will be *when* they had "reason to believe" that the Government's negligence or misconduct was a cause of death.

Before undertaking this individualized factual inquiry, a review of the legal landscape and standards governing the application of the discovery rule may be helpful. As noted, the crucial question is, when did the cause of action accrue? As the Eleventh Circuit has stat-

ed, " . . . in order for the claim to accrue, a plaintiff must have some indication that there may have been a government cause of the injury." *Diaz v. United States*, 165 F.3d 1337, 1340 (11th Cir. 1999). "[E]ven in non-malpractice wrongful death cases, the causal link to the government may be obscured." *Id.*; *Ramming v. United States*, 281 F.3d 158, 162 (5th Cir. 2001) (concluding that plaintiff's "awareness of a possible cause of action has two elements: (1) the existence of the injury; and (2) causation, that is, the connection between the injury and the government's actions.") (quotation omitted).

The issue of precisely how much knowledge is needed to trigger accrual bedevils discovery rule analysis. On the one hand, *some* indication at least of the defendant's responsibility must be available. On the other hand, the discovery rule puts a burden on plaintiffs to investigate once they have some reason to suspect foul play; accrual may occur long before there is firm confirmation of the defendant's probable culpability.

In other words, the statute of limitations is only tolled if the factual basis for the claim is "inherently unknowable," or, put differently, "incapable of detection by the wronged party through the exercise of due diligence." *Gonzalez*, 284 F.3d 281, 288-289 (1st Cir. 2002). Thus, "[o]nce a plaintiff knows of the injury and its probable cause, he/she bears the responsibility of inquiring among the medical and legal communities about whether he/she was wronged and should take legal action." *Id.* at 289.

This duty of inquiry is particularly strict when the injury at issue is a death. The First Circuit has noted that "the community disturbing event of death is likely to prompt immediate focus by third parties upon the cause thereof, thereby eliminating one possible delay in assembling a personal injury case." *Cadieux v. International Tel. & Tel. Co.*, 593 F.2d 142 (1st Cir. 1979).

See also Pacheco v. Rice, 966 F.2d 904, 907 (5th Cir. 1992) (noting that the "requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event.").

In view of these authorities, the Government contends that the mere fact that all the decedents died unexpectedly, usually of heart attacks when no cardiac disease or weaknesses previously existed, was sufficient to give notice of "some indication" of cause, and trigger a duty of inquiry right at the time of death. This argument goes too far. As the Ninth Circuit recently noted, "a cause of action does not accrue under the FTCA when a plaintiff has relied on statements of medical professionals with respect to his or her injuries and their probable causes." *Winter v. United States*, 244 F.3d 1088, 1090 (9th Cir. 2001). Plaintiffs in this case all assert that they initially relied on the VAMC's explanation of the cause of death, as imprinted on the respective decedent's death certificate. That initial reliance was reasonable. Something else was needed to trigger accrual.

As will be seen, substantial additional information was soon available to all plaintiffs, beyond the disturbing circumstances of the deaths, indicating negligence and malfeasance by VAMC employees. Even the least informed had notice by 1996 that the VAMC was under investigation for an unusually high number of cardiac-related deaths occurring during the period when their decedents died, and that a nurse there was the target of the investigation. As will by seen, this available information in due course triggered a duty to investigate. The "plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of

injury and causation to protect himself by seeking legal advice." *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir. 1998) (quotation omitted). "A claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, but such suspicions do give rise to a duty to inquire into the possible existence of a claim in the exercise of due diligence." *Id.* (citation omitted). *See also Drazan v. United States*, 762 F.2d 56, 59 (7th Cir. 1985) (holding that "knowledge of the government cause" was satisfied for purposes of the statute of limitations "when a reasonably diligent person in the tort claimant's position reacting to any suspicious circumstances of which he might have been aware would have discovered the government cause."); *Maggio v. Gerard Freezer & Ice Co.*, 824 F.2d 123, 128 (1st Cir. 1987) (holding in fraud context that " 'storm warnings' of the possibility of fraud trigger a plaintiff's duty to investigate in a reasonably diligent manner, and his cause of action is deemed to accrue on the date when he *should have discovered* the alleged fraud.") (citation omitted) (emphasis in original). Once due diligence should have disclosed sufficient facts to connect the Government to the injury, "the limitations period begins to run regardless of whether plaintiffs make inquiries, and regardless of whether they are correctly advised." *Gonzalez*, 284 F.3d at 289.

To justify their delay, plaintiffs cite *Stoleson v. United States*, 629 F.2d 1265 (7th Cir. 1980). In *Stoleson*, the Seventh Circuit held in the medical malpractice context that the plaintiff's mere suspicion that the injury had been caused by the Government was insufficient to start the limitations clock when the plaintiff could not garner enough medical support for her claim. *Id.* at 1270. The plaintiff's cause of action only began to accrue when that "suspicion ripen[ed] into knowledge of . . . causation." *Id.* at 1270-1271. According to the *Stoleson* court, "any plain-

tiff who is blamelessly ignorant of the existence or cause of his injury shall be accorded the benefits of the discovery rule" *Id.* at 1269.

Unfortunately, *Stoleson* cannot help plaintiffs. It has been limited by the First Circuit as a case involving "a breakthrough in scientific or medical understanding." *Fidler v. Eastman Kodak Co.*, 714 F.2d 192, 200 (1st Cir. 1983). No such breakthrough was required here for plaintiffs to discover that Gilbert was being investigated for the murder of patients at the VAMC.

Plaintiffs also cite *Attallah v. United States*, 955 F.2d 776 (1st Cir. 1992). There, the plaintiffs sued the United States for the theft of property lost when a courier was murdered by Government agents. *Id.* at 778.

The facts in *Attallah*, however, are easily distinguishable. The courier's body was found partially decomposed in a Puerto Rican rain forest. *Id.* When one of the plaintiffs traveled to Puerto Rico to make inquiries, the authorities there advised him "that they had no leads as to who was responsible for the criminal acts committed." *Id.* Thereafter, the plaintiff's neither heard, nor could have discovered, anything more about the cause of the courier's death until more than four years later, when a federal Grand Jury indicted two former Customs agents for the murder. *Id.* One month after the indictment, the Government contacted the plaintiffs with a request that they testify for the prosecution. *Id.* Approximately seven months later, the Customs Service received a letter from the plaintiffs claiming damages under the FTCA. *Id.*

In those circumstances, the First Circuit found that the plaintiffs simply had no reason, and could discover no reason through the exercise of due diligence, even to guess that the United States through the two rogue Customs agents was responsible for the murder. *Id.* at 780. It was only when the indictment came down that the

plaintiffs had any reason to suspect that Government agents were responsible for the murder and related theft; thus, their action accrued only at that time. *Id.*

As the following discussion will show, all of the plaintiffs now before the court were in a much different position. By 1996, each plaintiff knew (at least) that an investigation into the unusually high number of deaths from cardiac arrests at the VAMC was under way, that their decedents had suffered injury or death in the VAMC supposedly of cardiac problems during the precise time frame under investigation, and that a nurse there was the focus of the probe. Thus, unlike in *Attallah*, evidence of Government culpability surfaced within a short time of the deaths.

Plaintiffs are certainly correct that by 1996 they could not have known *all* the details of the deaths, or been able to prove that Kristen Gilbert killed their loved ones specifically by injecting them with lethal doses of epinephrine. Even the Government with all its investigative resources did not obtain an indictment until 1998.

But the discovery rule does not toll the limitations period until the plaintiff is able to prove her case. *See Childers Oil Co. v. Exxon Corp.*, 960 F.2d 1265, 1272 (4th Cir. 1992) (noting that plaintiff "may not know enough to win a verdict or even file a complaint on that first day, but that is why the law gives him a reasonable limitations period to investigate."); *Bradley v. United States,* 951 F.2d 268, 271 (10th Cir. 1991) ("To allow plaintiff to postpone accrual until he is passively informed by an outside source that his injury was negligently inflicted would serve to undermine the purpose of the limitations statute."). As the discussion below will show, the plaintiffs' knowledge of the investigation, the fact that it was targeting a nurse at the VAMC, and that it was looking into cardiac-related deaths, put each of the plaintiffs on

inquiry notice. Within two years, each was required to file an administrative claim, yet only Hudon, Brandt, and Cutting did so. For this reason, the court lacks subject matter jurisdiction over the other claims.

C. Isolated Ignorance

A final common issue may be disposed of here. Both plaintiffs McEwen and Lessard claim that only the knowledge of the *named* plaintiff is relevant to the issue of when their claim began to accrue. In each of their cases, the record supports an argument that the named plaintiff, for unique reasons, happened to know less as a subjective matter about the mounting evidence of Government culpability than other potential administrators and family members. Therefore, these plaintiffs claim that their ignorance-in-fact tolled the statute of limitations, regardless of what the other potential administrators knew.

No support exists for this argument, and it flies in the face of both applicable authority and practicality. No statute of limitations would have meaning if it were possible to avoid it simply by appointing a putative Rip Van Winkle as the estate administrator and plaintiff. Indeed, early last century, the Supreme Court found that the Federal Employers Liability Act's similar two-year statute of limitations "evidence[d] an intention to set a definite limit to the period within which an action may be brought under it without reference to the exigencies which arise from the administration of a decedent's estate." *Reading Co. v. Koons*, 271 U.S. 58, 63 (1926). This is in accord with the *Kubrick* Court's pronouncement that "the purpose of the limitations statute . . . is to require the reasonably diligent presentation of tort claims against the Government." *Kubrick*, 111 U.S. at 123. Thus, the dis-

covery rule does not require re-calculation of the statute of limitations in light of the subjective knowledge, or ignorance, of each potential plaintiff. The exception applies only when the cause of action is "inherently unknowable," *Gonzalez*, 284 F.3d at 289, not when it merely happens to be unknown by a particular potential plaintiff.

IV. CASE-SPECIFIC FACTS AND ANALYSIS

In what follows, each of the motions to dismiss will be analyzed in accordance with the legal framework outlined above.

The pivotal question in each case will be when, as a factual matter, sufficient information was available to the plaintiffs to reveal a connection between the VAMC and the deaths. Put differently, the central question will be: at what time would a reasonably diligent person have had access to sufficient facts to justify obtaining professional assistance and proceeding with an inquiry? As noted, for each of the plaintiffs, this time will be found to be no later than when they became aware of the critical facts of the Gilbert investigation.

A. Cutting (Civil Action No. 99-40065)

Kenneth Cutting ("Kenneth") had been hospitalized for some time at the VAMC with end-stage multiple sclerosis; he came down with a fever in late January, 1996. (Civil Action No. 99-40065, Docket 28, Exhibit B at 3518). As a result, the Cutting family visited him at the hospital. *Id.* At the time of the visit, Kenneth seemed to be in no danger, and doctors assured his wife and son that Kenneth was "getting well, he was getting better." *Id.*, Exhibit C at 49. However, on February 2, 1996, Kristen Gilbert telephoned Nancy Cutting, Kenneth's wife, at her

home to inform her that her husband had died. *Id.*, Exhibit B at 3522. The death certificate listed "cardiac arrest" and "multiple sclerosis" as the causes of death. *Id.*, Exhibit E.

Nancy Cutting testified that Kenneth never had any heart problems or cardiac history that she knew of. *Id.*, Exhibit B at 3520. When she heard that he had died, she "was in shock . . . [b]ecause he was fine. I didn't see any reason why he would be dead at that time, you know, why he would be passed away." *Id.* at 3522. Their son, Jeffrey Cutting ("Jeffrey") testified to his surprise as well, "if we were there the day before and he was fine, how come the next day he just died just like that, I mean, there was a question about that." *Id.*, Exhibit D at 43.

Nancy Cutting did not read any of the newspaper articles about the Gilbert investigation. *Id.*, Exhibit C at 65. However on August 1, 1996, she saw a television news report showing a picture of Gilbert, "saying there was a nurse at the VA hospital in Northampton that was being investigated." *Id.* at 66.[3] This report captured Cutting's attention because she immediately recognized the VAMC as the same hospital where Kenneth had died. *Id.* On August 1, 1996, Cutting contacted the VAMC "demanding to know exactly what ward and what shift were being investigated regarding the higher than usual number of cardiac arrests," and requested Kenneth's medical records. *Id.*, Exhibit F. Unsatisfied with the VAMC's response, Cutting contacted a lawyer. *Id.*, Exhibit C at 66.

Cutting's first lawyer obtained Kenneth's medical records, and sent them to her. *Id.* at 67. From these,

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[3]As noted below, Exhibit F of document 28, Civil Action 99-40065, shows that Cutting contacted the VAMC for more information about the investigation on August 1, 1996. Since Cutting's testimony that she first saw the television report in the first week of August has not been challenged, the court infers that Cutting viewed the news report on or about August 1, 1996.

Cutting learned that Gilbert was looking after Kenneth the week of his death. *Id.* Plaintiff filed her administrative tort claim with the Department of Veterans Affairs on May 20, 1998.

Nancy Cutting's conduct provides a template for reasonable promptness under the discovery rule in these cases. She first had an indication of impropriety at the VAMC possibly involving her husband (beyond the suspicious facts of his death) in August of 1996; she immediately obtained records and demanded an explanation. Receiving no satisfactory response, she contacted a lawyer and filed her administrative claim well within two years.

The Government's argument that her claim was time-barred is unpersuasive. It is true, as defendant points out, that the Cutting claim was facially time-barred because Kenneth died February 2, 1996, and the administrative claim was not filed until after February 2, 1998. However, the only evidence available to this plaintiff of the cause of her husband's injury prior to May 20, 1996 (two years before the administrative claim was filed was that (1) Kenneth had died; and (2) "cardiac arrest" was listed as one cause of death, despite the fact that Kenneth had no history of heart problems. As discussed above, these facts, alone, were insufficient as a matter of law to put plaintiff on inquiry notice. Without more, plaintiff was entitled to rely on the cause of death listed on Kenneth's death certificate.

As noted, the Cutting claim accrued on August 1, 1996, the date Nancy Cutting first had reason to know of the connection between her husband's death and the acts of VAMC employees; plaintiff filed her administrative claim on May 20, 1998, less than two years later, in compliance with the statute of limitations. Since the court has subject-matter jurisdiction over Civil Action No. 99-

40065, the motion to dismiss that complaint will be denied.

B. **Rauch (Civil Action No. 99-30231)**

Carl Rauch ("Carl") became a resident of the VAMC in February, 1989, and was transferred to the intensive care unit on October 1, 1995. (Civil Action No. 99-30231, Docket 18 at 1). He suffered a sudden cardiopulmonary arrest on October 2, 1995. *Id.* On October 12, 1995, Carl suffered two more heart attacks that led to his death. *Id.* at 1-2. The death certificate listed "myocardial infarction," a sudden insufficiency of blood supply to the heart, *see Stedman's Medical Dictionary* 868, 1167 (26th ed. 1995), as the cause of death. *Id.*, Docket 17, Exhibit C. During his prior six and one-half years at the VAMC, Carl had no heart problems. *Id.*, Exhibit B at 44.

Plaintiff Francis B. Rauch ("Rauch") was almost immediately informed of his brother's death. Rauch had never visited Carl at the VAMC but had kept informed of his condition, *id.* at 33, and was surprised at the cause of death. *Id.* at 44. Rauch felt that "through the years there was no expectancy of [Carl] dying of a heart attack as far as I was concerned." *Id.*

Rauch was aware of newspaper accounts through the summer of 1996 to the effect that there was an investigation ongoing at the VAMC. *Id.*, Docket 17, Exhibit B at 73. While admitting that he was generally aware of the investigation and that "yes, I read the articles," Rauch could not confirm that he read any specific stories. *Id.* at 72-73, 75. Rauch was, however, aware in 1996 that "a nurse" at the VAMC was the target of the investigation. *Id.* at 74-76.

The *Daily Hampshire Gazette*, a Northampton newspaper circulating generally in and around Hampshire

county, published multiple in-depth articles on the VAMC investigation in the summer of 1996. Several articles that were obviously available to Rauch offered a striking amount of detail.

A July 17, 1996, article with the headline "VA officials probe deaths" revealed that "[a] federal probe into 'a higher than usual numbers of deaths' from cardiac arrest on one ward" of the VAMC was underway. *Id.*, Docket 17, Exhibit E. That article noted that "foul play" could not be "ruled in or ruled out" at that time. *Id.*

On August 1, 1996, an article with the headline "VA nurse said a focus of the probe," disclosed that "investigators probing deaths at the U.S. Department of Veterans Affairs Medical Center are studying the role a nurse played in the care of those that died." *Id.*, Exhibit F. The article noted that while the unnamed nurse had not yet been charged with a crime, she was placed on leave "at about the same time that the VA's Office of Inspector General was called in to investigate what officials feared was a greater number of deaths due to cardiac arrest occurring on a particular ward during a particular shift than on others." *Id.* The same article made it known that the nurse in question had been arrested for trespassing, breaking and entering, and possession of burglary tools, and that her name appeared on the medical records of one veteran who had unexpectedly died of a cardiac arrest. *Id.*

An August 8, 1996 article with the headline "Federal Grand Jury Involved: Probe of VA Deaths Broadens," reported that a Grand Jury had been taking testimony for about a month. *Id.*, Exhibit G. Welch was quoted, and admitted that the Government had "sufficient information to (have brought) it to a Grand Jury," that "local law enforcement officials were asked to participate in the investigation based on their expertise, especially in homicide cases," and that the investigation was "focusing on

deaths that occurred at the VA center between fall 1995 and winter 1996." *Id.*

While Rauch admits to being familiar with the articles describing the investigation in general, he maintains that the "real trigger" — that is, the event that in his mind exposed the VAMC's responsibility for Carl's death — was the November 24, 1998, newspaper headline announcing Gilbert's indictment for murder. *Id.*, Exhibit B at 58.

Unfortunately, a plaintiff's subjective state of mind does not determine the date of accrual of a cause of action under the discovery rule. As the Supreme Court has noted, "the prevailing rule under the Act has not been to postpone the running of the limitations period in malpractice cases until the plaintiff is aware that he has been legally wronged." *Kubrick*, 444 U.S. at 121 n. 8. *See also Attallah*, 955 F.2d at 780 ("The standard set forth by the discovery rule is an objective one.").

Once Rauch became aware of the investigation at the VAMC, he had a duty to "protect himself by seeking advice in the medical and legal community." *Kubrick*, 444 U.S. at 123. By the summer of 1996, Rauch knew that a nurse was being investigated in connection with the unusually high number of cardiac arrests on a particular ward in the VAMC, during a particular time. Like Nancy Cutting, Rauch had a reasonable opportunity to inquire further once these indications of Government responsibility came to light and to file a claim within two years, *i.e.*, by the summer of 1998 at the latest.

This conclusion is supported by Chief Judge Young's opinion in *Heinrich v. Sweet*, 44 F. Supp.2d 408 (D. Mass. 1999). There, Judge Young found that the plaintiffs' claims were not barred by the statute of limitations, even though there were existing articles and reports which would have raised plaintiffs' eyebrows. *Id.* at 416. In *Heinrich*, however, the relevant information appeared in

rather obscure articles or reports; there was no evidence that the plaintiffs had either read them or had reasonable access to them. *Id.* at 416-417. Judge Young held that "reasonable diligence does not require plaintiffs to scour medical journals." *Id.* at 417.

In this case, the record is clear that Rauch actually did read some of the articles the Government points to, had access to others and was aware of the material facts of the investigation. Thus, his claim accrued, even with the help of the discovery rule, by August 1996 at the latest. Since no administrative claim was filed until December 23, 1998, more than two years after August, 1996, this court has no subject matter jurisdiction over Civil Action No. 99-30231. The motion to dismiss will be allowed.

C. **Siska (Civil Action NO. 00-30080)**

Angelo Vella ("Vella") checked into the VAMC in February, 1996, after going to the emergency room when his stepdaughter, JoAnn Sell ("Sell"), a nurse, noticed that he looked "swollen and edematous" and "was having difficulty breathing." (Civil Action No. 00-30080, Docket 19, Exhibit A at 876). On February 4, 1996, Sell received a phone call from the VAMC advising her that Vella had suffered a cardiac arrest. *Id.*, at 878. The family immediately traveled to the VAMC to see him. *Id.*

Unlike the other plaintiffs, Vella survived his cardiac incident for almost a year, and was able to inform his family how it happened, providing exact details as to Gilbert's involvement.[4] Several members of the family recounted what Vella told them and were important witnesses during the Gilbert criminal trial. According to Sell, Vella "was quite cognizant . . . . He was very alert, not — he didn't

[4] Vella ultimately died on February 2, 1997.

seem to be confused at all." *Id.*, Docket 19, Exhibit A at 883.

Mary Vella, Vella's other daughter ("Mary"), described her conversation with Vella in the following way:

> Q: When you say that he said, "It happened when she [Gilbert] put something in my arm," did he describe what that process was, what had happened?
>
> A: He said that, well, when she put something in his arm his legs began to become numb and his arms became numb and he felt like his heart was going to explode.

Id., at 860. Sell recounted the conversation in her Grand Jury testimony, as follows:

> A: He said the nurse was, had come in, and she was putting some kind of medication in his IV with a syringe which he felt was a routine thing that she was supposed to do. He didn't know. And he said that during the period while she was doing the injection, he felt really flushed and hot, and then he started to feel stomach pain and chest pain, and he just remembers another nurse, Frank, coming in the room and yelling something about taking the IV out, and then everything kind of went foggy and he didn't remember anything after that.
>
> * * *
>
> Q: When you heard the news, I mean, how did you react to that?
>
> A: I thought it was kind of really strange. I said, I thought to myself either it's an awful coincidence or something isn't quite right here. *Id.*, Docket 19, Exhibit D at 8-9.

Vella's wife, Carol Vella ("Carol") recalled what Vella

told her the next day about the incident: "he said he felt Kristen Gilbert made an error and accidently injected him with the wrong stuff and that she had personal problems and he did not want to jeopardize his care at the V.A. by reporting this." *Id.*, Exhibit E. Vella's brother-in-law, Siska, who is also the named plaintiff and executor of Vella's estate, visited Vella after the cardiac arrest. During that visit, Vella "complained of a burning sensation in his arm after receiving an injection from a nurse." *Id.*, Exhibit F. Siska noted that "[m]y sister Carol, and my nieces were aware of [the incident]." *Id.*

After Vella was discharged, Carol received a call from an investigator, who identified herself and asked Carol questions about what happened that night. Carol explained that she was not present, and passed the phone to Vella. Vella indicated that he got "good care" at the VAMC, and declined to get involved. *Id.*, Exhibit G at 26-27. Carol informed Sell of this call, and Sell confronted Vella. Sell testified in the Grand Jury proceedings:

> My mom had indicated that there was some, someone had called her regarding an incident at the VA, and they wanted to talk to [Vella]. I asked [Vella] what it was about, and he said they were talking about when he had the cardiac arrest and with the IV, flushing the IV, or whatever the nurse was doing with the IV. And I said to Angelo: "You know, it's really bizarre, and it's very unlikely that you would have an arrest during a procedure like that of flushing an IV with normal saline. You really should just talk to them. Maybe it's nothing, but you really should, you know, talk to these people," and he refused.

Id., Exhibit D at 10. Vella explained to his stepdaughter that "[h]e was very happy with his care at the VA. He didn't want anything to disrupt it. He, he just felt if he made any waves, he, he felt he wouldn't get the same kind of care." *Id.*

With these facts, it is clear that Vella knew (1) that he had been injured and (2) that the cause of his injury was an injection of some substance by Kristen Gilbert, by early February 1996. Vella's family knew the same within hours or days: Vella felt "like his heart was going to explode" as Gilbert was injecting him, and he had a heart attack. Within seconds of being injured, Vella was in "possession of the critical facts that he has been hurt and who has inflicted the injury." *Kubrick*, 444 U.S. at 122. A straightforward application of *Kubrick* confirms that this cause of action accrued on February 4, 1996, when Vella described the details of Gilbert's attack to his family. From that date he had two years to file an administrative claim. No such claim was filed, however, until March of 1999.

Plaintiff argues that, until Gilbert's indictment, neither Vella nor his family members realized that he had been the subject of a *criminal* attack, or were sure that the heart attack did not occur naturally. Indeed unlike the other decedents, Vella did have preexisting heart problems. (Docket 22, Exhibit 4 at 39). While it may be true that plaintiff's knowledge fell short of subjective certainty, the Supreme Court has made it clear that Congress did not intend to postpone the accrual of a claim until plaintiff is subjectively aware that he was wronged. *Kubrick*, 444 U.S. at 123. As noted above, the cause of the injury must have been "inherently unknowable" before the discovery rule will apply. When the victim himself survives an attack, and describes it to family members with the level of specificity provided by decedent in this case, the discovery rule is simply unavailable to extend the limitations period.

In sum, since the court has no subject-matter jurisdiction over Civil Action No. 00-30080, the motion to dismiss must be allowed.

D. **McEwen (Civil Action No. 99-30232)**

Ralph McEwen ("Ralph") presented himself to the VAMC on December 13, 1995, with complaints of shortness of breath. (C.A. 99-30232, Docket 18 at 1). At 6:15 p.m., he developed ventricular tachycardia and suffered ventricular fibrillation, but was successfully defibrillated. *Id.* At 8:00 p.m., Ralph had another similar cardiac episode and died. *Id.* at 1-2.

At the time of Ralph's death, Ralph's brother, Warren McEwen ("Warren") was acting on behalf of the estate. *Id.*, Docket 17, Exhibit B at 47, 66. Warren, living in Florida, was officially designated Ralph's "First next of Kin," and was the only individual who Ralph indicated should be contacted by the VAMC in an emergency. *Id.*, Exhibit C. Warren came to Massachusetts after Ralph's death for "a couple weeks," and Warren informed the VAMC of the name of the funeral home. *Id.*, Exhibit D.

In September, 1996, Warren was contacted by the Associated Press about his brother's death as part of the media inquiry into the ongoing investigation. As a result, Warren wrote a letter to the Department of Veterans Affairs dated September 30, 1996. The letter included the following passage:

> On December 13, 1995, Ralph L. McEwen died at the Northampton V.A. Hospital, Northampton, Massachusetts. I was named as his next of kin and traveled to Massachusetts to handle his funeral. . . My main concern with my brother's death was brought up by a contact last week with a phone call from the Associated Press in Springfield, Massachusetts. I was informed that there is some questionable aspects to the deaths of a number of veterans being treated in the

> Northampton facility over the past few years prior to Ralph's death in December 1995. These deaths appear to involve an unusually high number of heart attacks. . . . If, as the reporter from the Associated Press informed me that a governmental review of the Northampton medical practices is being reviewed I request the results of this study be sent to me. I hope I will receive a response to this inquiry in the near future.

Id., Exhibit F. Bruce Gordon, the Medical Center Director, replied by letter on November 20, 1996. His only response to Warren's inquiry about the investigation was contained in the following paragraph:

> Regarding the telephone call you received from a member of the Associated Press in Springfield, Massachusetts claiming that there are some questionable aspects to a number of death of veterans treated at Northampton, I can only respond that an investigation is being conducted and consequently I am unable to comment further at this time. No results of the investigation may be released until the investigation is completed.

Id., Exhibit G. Warren does not deny that he received this letter.

This correspondence indicates that by the end of 1996, around the time Warren received the letter from Director Gordon, the cause of Ralph McEwen's death was no longer "inherently unknowable." By that time, Warren had knowledge that an investigation was going forward into the unusual number of cardiac related deaths at the VAMC, and that there were some "questionable aspects" related to his brother's death. Warren's wife remembered that Kristen Gilbert was Ralph's nurse, *id.*, Docket 19, Exhibit D at 56, and Warren could have learned from the newspaper accounts that a nurse at the VAMC was under investigation. There can be little question that at this

time, Warren had "some indication that there may have been a government cause of the injury." *Diaz*, 165 F.3d at 1340. To preserve the rights of the estate, he had a duty to inquire further and file a claim within the following two years.

Plaintiffs argue that, while Warren should perhaps have known of the likely connection between the VAMC and Ralph's death by the end of 1996, the lawsuit's accrual date should be calculated based on the knowledge of the actual plaintiff. In this case, Ralph's son, Michael McEwen ("McEwen"), became the administrator of Ralph's estate, not Warren. McEwen contends that he never heard about Warren's exchange with the Department of Veterans Affairs and claims that he knew nothing whatsoever about any investigation until the indictments were announced in 1998. Docket 17, Exhibit B at 86.

McEwen was able to maintain this ignorance because he had not seen his father for "a couple of years" before his death, although he lived 45 miles from the VAMC in Shirley, Massachusetts. *Id.* at 19. McEwen never visited because, as he explained, "[t]here was some hard feelings about people in [Ralph's] life that he had in his life now. It was just better to keep that separate." *Id.* at 34. Although they spoke on the telephone between once a month and once every four months, *id.* at 35, McEwen was not listed as a person to contact in case of emergency, and did not have much to do with arranging the funeral. McEwen confessed that "[Ra]ph] and his brother were very close. And at the time I was a little bit undependable." *Id.* at 47.

Thus, only Warren was contacted by the Associated Press, and the record is devoid of evidence that Michael McEwen knew about the VAMC investigation. McEwen

claims that he did not read the *Daily Hampshire Gazette*, and denies having any other knowledge of the investigation. Prior to 1998, McEwen knew only that his father had died of a heart attack at the VAMC. Although he was "surprised" because he thought his father "looked great and wasn't heavy, quit smoking a few years back," *id.* at 48-49, that surprise was not sufficient in itself to put McEwen on inquiry notice.

Unfortunately, the authorities make clear that the discovery rule is meant to protect "blameless ignorance," not ignorance achieved by isolation from the decedent. Warren had accumulated information about the investigation and his brother's death, and information about the pendency of the investigation was readily available, by the end of 1996. Nevertheless, plaintiffs in this case did not file their administrative claim until March 18, 1999, more than two years after their claim accrued. The motion to dismiss Civil Action No. 99-30232 must therefore be allowed.

E. **Skwira (Civil Action No. 00-30192)**

Edward Skwira ("Edward'") started rehabilitative treatment for alcohol abuse in February, 1996, and was transferred to the VAMC on February 15, 1996. (Civil Action No. 00-30192, Docket 16, Exhibit B at 5267-5268). That day, Edward experienced a severe cardiac event, a dissecting aneurysm, *id.*, Exhibit C at 12, and the family was told to prepare for his death. *Id.*, Exhibit B at 5277. Edward died on February 18, 1996. *Id.*, Docket 17 at 1.

The plaintiffs are members of Edward's family, who were with Edward throughout this time. They are Statia Skwira, Edward's widow, as administratrix of the estate, Marsha Yarrows, Edward's daughter ("Yarrows"), Edward Skwira, Jr., Edward's son ("Edward Jr."), and Phillip Skwira, Edward's other son ("Phillip").

Following Edward's death, the family discussed having an autopsy done. *Id.*, Docket 16, Exhibit C at 16. They were surprised that Edward had died of heart complications at the VAMC when he was not admitted for heart problems, and they suspected that Edward's care at the VAMC was inadequate. *Id.*, Exhibit D at 16.

In the summer of 1996, Yarrows began reading about the murder investigation at the VAMC in the newspaper. *Id.*, Exhibit B at 9888. She testified that after reading those reports, "it was like a lightbulb went off because I knew that was exactly what had happened to my father. . . ." *Id.* Yarrows explained that after reading the newspaper clippings,

> It - it really bothered me, and even though my father's name wasn't mentioned as being one of the people who was investigated, I knew right then and there that that was exactly what had happened to him, that he was one of the people that they must be investigating the death of.

Docket 16, Exhibit B at 10093.

As it turned out, Yarrows was not the only party wondering whether Edward had been murdered. In October 1996, investigators, including State Trooper Kevin Murphy ("Trooper Murphy") and Assistant United States Attorney Welch ("Welch"), met with the Skwira family and sought permission to exhume Skwira's body. Trooper Murphy testified that at this meeting, "we explained to her that we had reviewed the case and that our medical people had some concerns that perhaps Mr. Skwira did not die of natural causes." *Id.*, Exhibit H at 12. Welch added that he "told her there had been an increase in deaths and that people were looking at it, to determine whether it was natural or — or something else had been going on." *Id.*, Docket 1B, Exhibit D at 29.

In essence, Welch relayed that investigators needed "to figure out whether something wrong had happened,

[but] . . . it didn't necessarily mean that something wrong had not [sic] occurred to Edward." *Id.*, Docket 18, Exhibit D at 23. Welch tried to talk about the Government's suspicions with Skwira as neutrally as possible because he "did not want to heighten her expectations or make her believe that something suspicious had happened when, you know, just two weeks later we could have an autopsy that completely ruled out any suspicious cause of death." *Id.* at 24. The family gave them permission to exhume and autopsy the body on November 7, 1996. *Id.*, Docket 16, Exhibits J and K.

In November of 1996, the day after the autopsy and exhumation, Welch attended Edwards' reinterrment. *Id.*, Docket 18, Exhibit D at 26. When Skwira asked Welch about the results of the autopsy, he informed her that "the death certificate as printed was incorrect." *Id.* at 26-27. Welch emphasized that Edward "didn't die of a heart attack," although he quickly added that "did not mean that he did die of — of unnatural causes . . . ." *Id.* at 27. Welch promised to keep Skwira informed. *Id.*

In July of 1997, Welch met again with Skwira and Phillip. In this meeting, he informed them that the authorities "had found ketamine in certain toxicological samples for Edward Skwira, that the presence of the ketamine was a surprise." *Id.* at 10. The ketamine in Edward's body was not a lethal dose, however, and Welch mentioned it to Skwira mainly to ask her about possible reasons that Skwira might have ketamine in his system, and to keep her informed. *Id.* at 11. Skwira re-inquired about the results of the autopsy generally, and Welch reaffirmed that the death certificate was incorrect, although the Government still could not rule out that Edward had died of natural causes. *Id.* at 14-15. The July meeting was essentially a fact gathering meeting; at the time, the Government wanted to know Edward's entire medical history. *Id.* at 30.

Until 1998, Skwira and her family took no action on their own and relied on Welch. Skwira reports that,

> We cooperated with them completely throughout their investigation, and during the trial. We supplied all information they requested. We believed that they were working diligently on whatever they were doing, and we were told by them that they would provide us with such evidence as they could about the results of the autopsy when it was available to them. They also said they would tell us about the results of their investigations when it was possible to do so.

Id., Exhibit C ¶ 8. Skwira called regularly to check with Welch but did not conduct an investigation of her own or consult with a lawyer. *Id.*

The Skwira family was not conclusively told that Edward had not died of natural causes until June, 1998. *Id.*, Exhibit D at 6. This was also the first time they were told that epinephrine was found in Edward's body. *Id.* at 7. Plaintiffs contend that the discovery rule tolled the statute of limitations until this time. They filed their administrative claim on October 8, 1999.

Unfortunately, the clear legal standards discussed above make it unavoidable that plaintiffs' cause of action accrued no later than Skwira's conversation with Welch in November, 1996.

In the summer of 1996, Yarrows became aware of the investigation at the VAMC and began to suspect that her father had died from foul play. Indeed, it would be hard to fashion a metaphor that more clearly conveys the moment when a cause of action will accrue for purposes of the discovery rule than when, as Yarrows put it, "a light bulb went off," suggesting VAMC responsibility for her father's death.

The circumstances outlined above, giving plaintiffs detailed knowledge of the ongoing investigation, all confirm that the cause of injury was by no means inherently unknowable by the end of 1996.

As the First Circuit has recently stated, "the limitations period begins to run regardless of whether plaintiffs make inquiries, and regardless of whether they are correctly advised." *Gonzalez*, 284 F.3d at 289. The limitations clock does not toll pending the outcome of a Government investigation. "Once a plaintiff knows of the injury and its probable cause, he/she bears the responsibility of inquiring among the medical and legal communities about whether he/she was wronged and should take legal action." *Id.* at 289. Plaintiffs knew in 1996 that Edward did not die as the VAMC said he did, and that there was an investigation targeting a VAMC nurse over the unusually high number of cardiac related deaths. Their "ability to investigate" was not "thwarted by ignorance of the details . . . ." *Rotella*, 528 U.S. at 557.

Admittedly, plaintiffs would not have been able to prove (or possibly even learn) in 1996 that Kristen Gilbert had killed Edward specifically by injecting him with epinephrine. However, it is unquestioned that within the two-year statute of limitations the plaintiffs could have learned enough to file a claim against the VAMC, like Cutting and the other plaintiffs not subject to this motion. *See Childers Oil Co. v. Exxon Corp.*, 960 F.2d 1265, 1272 (4th Cir. 1992)(observing that plaintiff "may not know enough to win a verdict or even file a complaint on that first day, but that is why the law gives him a reasonable limitations period to investigate."). Plaintiffs did not file their administrative complaint until October 8, 1999, well more than two years after the claim accrued in 1996. Therefore, this court is without subject matter jurisdiction over Civil Action No. 00-30192 and must allow the Government's motion to dismiss.

F. Lessard (Civil Action No. 00-30076)

Stanley Jagodowsi ("Stanley") was a diabetic, and was admitted to the VAMC on July 21, 1995 for postoperative care following an above-the-knee amputation. (Civil Action No. 0030076, Docket 14, Exhibit A at 176-177). Stanley was found on the floor August 21, 1995 after suffering a heart attack, and died a little after midnight on August 22, 1995. *Id.*, Docket 16, Exhibit A at 2.

Stanley was survived by his wife, Claire Jagodowski ("Jagodowski"), and his daughter Susan Lessard ("Lessard"). After the amputation, Lessard thought that Stanley "was looking great," that he was "wonderful . . . his mood was better. He was eating. He was generally happy. His pain was gone." *Id.*, Docket 16, Exhibit B at 41. Plaintiff was surprised by Stanley's death because he had been doing well, *id.* at 64-65, but she recognized that he was not a robust man. In addition to the amputation, he suffered from adult-onset diabetes and may have suffered from a stroke in 1995. *Id.* at 34-38. Jagodowski was interviewed by the media in connection with the Gilbert investigation, and was quoted twice as, in essence, "wanting answers." On July 18, 1996, the *Springfield Union News* reported as follows:

> Family members of patients whose deaths are being probed by federal investigators at the U.S. Veterans Affairs Medical Center in Leeds wondered yesterday whether their kin may have been victims of foul play, but officials would neither confirm nor deny that criminally administered drugs could have caused a rash of fatal heart attacks at the hospital.
>
> "If there's anything fishy, I want to know," said Claire Jagodowski of Holyoke. Her husband, Stanley, a 66-year-old Korean War Army veteran, died of cardiac arrest at the medical center last August 22.
>
> * * *

> But, sources at the sprawling federal facility said that word has circulated there about inventory discrepancies involving the drug epinephrine.
>
> * * *
>
> Dr. John Zimmerman, a cardiologist at Medical West in Chicopee, said the drug epinephrine, when injected, can cause cardiac arrest in high dosage.

Id., Docket 14, Exhibit F. The evening of July 18, 1996, Jagodowski was featured in an 11:00 Channel 22 news story in Springfield. According to the transcript, the broadcast proceeded as follows:

> Dan Elias, anchor: In other news tonight, a Holyoke widow wonders this evening if the cause of her husband's death is suspicious. Sixty-six-year-old Claire Jagodowski still mourns the loss of her husband Stanley. He died last year while at the VA hospital in Northampton. An unusually high number of heart attack deaths at the hospital has sparked a federal investigation. Jagodowski says, although her husband had many illnesses, he did die of a heart attack, and now she wonders.
>
> Claire Jagodowski (Husband Died At Veterans Affairs Hospital): Care was not free. Most people are — most of the people up there are compassionate individuals. However, there are some that have mean streaks. And not knowing what floor this occurred on and what ward, that I'm very interested to find out, where these people were dying.
>
> Elias: Federal investigators were expected back on hospital grounds next week to further their probe.

Docket 14, Exhibit G.

Jagodowski was also interviewed by Special Agent Timothy Bond ("Bond") on August 30, 1996. Jagodowski told him she was contacted by "Brad Smith and the newspapers in Springfield, Holyoke, Boston Herald and

Channel 22," and "by a woman regarding a Class Action Suit," and that Claire "had seen the articles in the newspapers about Ward C." (Docket 14, Exhibit D). Jagodowski informed Bond that Gilbert was one of Stanley's nurses. *Id.*

Jagodowski's memory of these interviews, and of what she knew in 1996, was hazy during her deposition. *Id.*, Docket 16, Exhibit C at 40-52. Similarly, Lessard could not recall whether she was aware of the Gilbert investigation in 1996, and could not recall whether her mother had told her about any of her news interviews or appearances. *Id.*, Exhibit B at 55-59. However, neither denied that the interviews took place, that they were aware of the investigation, or that Jagodowski read the articles in which she was quoted. Jagodowski also did not deny that she spoke with Agent Bond or dispute his version of the substance of their conversation.

Thus, given these interviews, it cannot be doubted that Jagodowski knew: (1) that an investigation was underway at the VAMC; (2) that it centered on Gilbert; (3) that Gilbert was Stanley's nurse; (4) that there might be something "fishy" about the rash of cardiac-related deaths on Ward C; (5) that some persons were contemplating a class action lawsuit, and (6) that the drug epinephrine was suspected. In light of this information, it cannot plausibly be argued that the cause of Stanley's death was inherently unknowable as of late 1996.

Unfortunately, plaintiff did not file her administrative claim until September 29, 1999. Therefore, this court has no subject matter jurisdiction over Civil Action No. 00-30076, and the claim must be dismissed.

V. CONCLUSION

For the reasons set forth above, defendant's motion to dismiss as to plaintiff Cutting (Civil Action No. 99-40065)

is hereby DENIED. Defendant's motions to dismiss as to plaintiffs Rauch (Civil Action No. 99-30231), Siska (Civil Action No. 00-30080), McEwen (Civil Action No. 99-30232), Skwira (Civil Action No. 00-30192), and Lessard (Civil Action No. 00-30076) are hereby ALLOWED.

This court's close familiarity with the suffering already endured by the families of some of these plaintiffs makes these orders of dismissal especially distasteful. Unfortunately, the rulings appear to be mandated by controlling authority. Nevertheless, since the decisional law governing the discovery rule is less than crystal clear on all points, and appears to be continuing to evolve, counsel may want to consider the possibility of appeal with special care.

Separate orders will issue.

s/Michael A. Ponsor
MICHAEL A. PONSOR
U. S. District Judge

United States Court of Appeals
For the First Circuit

No.02-1988 MANDATE

STATIA A. SKWIRA, as Administratrix of the Estate of Edward S. Skwira, and Individually; MARSHA YARROWS; EDWARD S. SKWIRA, JR.; PHILIP E. SKWIRA,
Plaintiffs, Appellants,

v.

UNITED STATES,
Defendant, Appellee.

JUDGMENT

Entered: September 15, 2003

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

By The Court:
s/Richard Cushing Donovan
Richard Cushing Donovan, Clerk

Certified and Issued as Mandate
under Fed. R. App. P. 41.
Richard Cushing Donovan, Clerk
Date: Nov 20 2003

[cc: Mr. Callahan, Mr. Olderman and Mr. Corey]

United States Court of Appeals
For the First Circuit

No. 02-1988

STATIA A. SKWIRA, As Administratrix of the Estate of Edward S. Skwira and Statia A. Skwira, Individually; MARSHA YARROWS; EDWARD S. SKWIRA, JR.; PHILIP E. SKWIRA, Individually
Plaintiffs-Appellants

v.

UNITED STATES,
Defendant - Appellee,

Before,

Boudin, **Chief Judge**,
Torruella, Selya, Lipez and Howard,
Circuit Judges

Order Of The Court

Entered: November 13, 2003

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be **denied**.

By The Court;

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk

[CC: John M. Callahan, Esq., David C. Kuzmeski, Esq., Stephen R. Kaplan, Esq. , R. Todd Ingram, Esq., Clay R. Mahaffey, Esq., Richard A. Olderman, Esq., Robert S. Greenspan, Esq., John M. Corey, Esq.